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BASELINES AND FREEDOM OF THE SEAS

BY

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BASELINES AND FREEDOM OF THE SEAS

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CHAPTER I

SOVEREIGNTY VS. FREEDOM OF THE SEA

In recent years, considerable emphasis has been placed on assertion of sovereignty at the expense of freedom of the seas. Only this March, at hearings on defense appropriations, Admiral David L. McDonald alluded to this trend:

> Another item of deep concern in recent years, about which Secretary Nitze and I have had numerous discussions, is the apparently concerted attempt to erode the concept and extent of the free high seas by extending the limits of territorial waters.[1]

There are two methods by which such erosion can be accomplished. First, the width of the territorial sea can be extended to some width which will produce a great belt of waters over which a coastal or island nation claims sovereignty. This method has been common in the history of the sea. Smith[2] feels that Galiani, the Italian writer, may have been, in 1782, the first to suggest a three mile width for the territorial sea. Smith attributes much of the confusion surrounding the three mile zone to this. Additionally, he points out that claims of four miles by Norway and Sweden date back to the middle eighteenth century, the earliest delineation of a territorial belt.

[1]United States Congress, Senate, Committee on Armed Services, Military Procurement Authorizations, Fiscal Year 1966. Hearings before the Committee and the Subcommittee on Department of Defense of the Committee on Appropriations, 89th Cong., 1st Sess. on S.800, February 24 - March 15, 1965 (Washington: Government Printing Office, 1965), p.753.

[2]G.A. Smith, The Law and Custom of the Sea (2d. ed.), (New York: Praeger, 1954), p. 2672.

Characteristically, major maritime powers press for narrower breadth of the territorial belt. The United States and the United Kingdom have traditionally recognized the three mile limit. The Soviet Union, fast becoming a naval power, adheres to a claim of twelve miles width for the territorial sea. It will be interesting to see whether this position will continue to be maintained by the Soviets as they join the ranks of the maritime powers.

The lesser developed nations and those with smaller maritime and naval fleets lean towards acceptance of a twelve mile or wider breadth for the territorial sea. The most extreme claim in this regard is that of six nations on the Pacific coast of Central and South America: Chile, Costa Rica, Ecuador, El Salvador, Honduras, and Peru. Either as territorial waters or for fishing rights, these six nations claim a 200 mile belt off their shores.

The discussions and debates on the territorial sea and contiguous zone occupied a large amount of time during the United Nations Conference on the Law of the Sea in 1958[3] and was the theme of the Second United Nations Conference on the Law of the Sea in 1960.[4] The results of these two conferences in dealing with that problem can best be termed that the

[3]United Nations, United Nations Conference on the Law of the Sea, Vols. I-VII, A/Conf. 13/37-43, (Geneva: United Nations, 1958)

[4]United Nations, Second United Nations Conference on the Law of the Sea, A/Conf. 19/8(Geneva: United Nations, 1960)

sixty-eight nations which participated in the two conferences agreed to disagree.

The second method by which territorial waters may be extended is in the establishment of the reference line on which measurement of the territorial sea is to be based. Where this reference is not the coast itself, some sort of baseline system is used. The use of baselines is less deeply rooted in the history of the law of the sea than that of the width of the territorial sea. Colombos[5], however, alludes to the case of The Anna, an American ship seized by a British ship off the mouth of the Mississippi River in 1805, where the alluvian islands were determined to be a reference for the measurement of the territorial sea. In recent years, the Anglo-Norwegian Fisheries case (1951) and the United Nations Conference on the Law of the Sea (1958) have produced the most relevant results on the subject of baselines. The former lent an air of legality to straight baseline systems which join reference points on or near a coastline and involve linear references rather than those related to the sinuosities of the coast. Although the Fisheries case and the United Nations Conference dealt only with coastlines such as that of Norway, extensions of the application of straight baseline systems to ocean archipelagos has been attempted and is a telling example of the claim of sovereignty over waters generally accepted

[5]C.J. Colombos, The International Law of the Sea (3rd rev. ed.), (London: Longmans, Green and Company, 1954), p. 85.

of [illegible] areas.

There is a temptation to become absorbed in the legal issues of the codification of international law pertaining to the territorial sea and contiguous zone. To succumb to such a lure would be to ignore the basic realities of the international system. International law, to be adhered to, must be reflective of the conditions existing in the system. It is contingent on the consensus of power for its effectiveness. The Conventions on the Law of the Sea must be regarded in this light. Further, it is in such a perspective that the dichotomy between freedom of the seas and extension of national sovereignty must be viewed.

In the past, the quest for sovereignty over the territorial sea and contiguous areas has centered around fishing rights. Today, with an expanding world population, fishing and other procurement of food from the sea continues to be an important element in the issue, but other considerations have gained equal or greater significance. In the economic field, oil, mineral and other resources of the ocean bottom or earth's subsurface have become involved. Overshadowing economic ramifications, however, are the factors related to politics or security and which bear relevance to the confrontation between the communist and free worlds.

It has become evident that smaller nations, particularly archipelagic or island states, feel that sovereignty over sea areas

Tribunal was to arrive prior to establishing the jurisdictional area. As early as 1911, the United States started using to base its claim,

> It has been recognized by the United States that bays whose mouths are less in extent than double the distance which is assumed as the limit of territorial jurisdiction may be considered further than the territorial belt of the waterway set by the report of the United States Fisheries Council of May 19, 1910, and the letter of the Attorney General of November 8, 1910, including the bays of the United States generally to be "as being 'landlocked' within the body of the United States."[2]

A whole new category of claims to coastal waters is created by the "historic bay" idea referred to and will be discussed in Chapter V. Where a concept such as the "historic bay" concept could not be used further difficulty arose. The United States had long espoused a doctrine of measurement of the limit of the territories sea from the concavities, regardless of indentations. In 1910, as a result of the North Atlantic Fisheries Arbitration, it was adjudged:

> As the case of bays, the three marine miles limit of the territorial sea is to be measured from a straight line drawn across the body of water at a place where it ceases to have the configuration and characteristics of a bay. At all other places the three marine miles are to be measured, following the sinuosities of the coast.[3]

Further, it was stated:

> 1. In order that any bay-territorial specification may be claimed, the limits of exclusion shall be drawn across every bay, not exceeding the limit to the part reserved for entrance, at the first point where the width does not exceed ten miles . . .[4]

[2]United States Congress, Senate, Proceedings of the North Atlantic Fisheries Arbitration, Sen. Doc 870, 61st Cong. 3rd Sess. Vol. I (Washington: Government Printing Office, 1910), p. 64.

[3]Ibid.

[4]Ibid.

Arbitration and cited as exceptions in the judgement.

The low-water rule had been accepted prior to the Fisheries Arbitration and was considered on by Judge John Bassett Moore:

> [I do not observe (no cross to Mr. Barclay), that there could be any answer to the most convincing reason to prefer the low water line to any a cord (a line of double three miles, I may say that this has supposed to exist reasons both of convenience and of safety. The low-water line has been adopted in the cases referred to, as I understand them, as a practical rule.]5

II. BASIC BASELINE CONCEPTS

The headland theory

Nowadays referred to as the "headland theory" of delimitation of baselines, it is deeply rooted in history, but has been seriously re-worked and virtually abandoned. In order to clarify references to it, it is worthy of note, it could be said to survive in an extremely limited sense in Article 7 of the 1958 Convention on the Territorial Sea and Contiguous Zone. The concept originated in the proclamation of James I in 1609 whereby he, in the "King's chamber" doctrine, claimed English jurisdiction over an area formed by squaring off the British Isles (literally drawing straight lines around them).6

5Annuaire de l'Institut de Droit International, 13 (1894-95), p. 146, cited in S.W. Bogge, "Delimitation of the Territorial Sea", American Journal of International Law Vol. 24 (1930), p. 349.

6F.C. Jessup, The Law of Territorial Waters and Maritime Jurisdiction (New York: G.A. Jennings Co. Inc., 1927), p. 360n.

It was in a letter between the Secretary of State, Bayard, and Secretary of the Treasury Manning on 28th of May, 1886, that this theory was strongly rejected:

> We may therefore regard it as settled that so far as concerns the eastern coast of North America, the position of this Department has uniformly been that the sovereignty of the shore does not, so far as territorial authority is concerned, extend beyond three miles from low-water mark, and that the seaward boundary of this zone of territorial waters follows the coast of the mainland, extending where there are islands so as to place round such islands the same belt. This necessarily excludes the position that the seaward boundary is to be drawn from headland to headland, and makes it follow closely, at a distance of three miles, the boundary of the shore of the continent or of adjacent islands belonging to the continental sovereign.[7]

The Norwegian System

The northern coast of Norway presents a complex network of islands, rocks, bays and inlets which have been treated in a particular manner by that coastal state in the delineation of its territorial sea. As early as 1812, a Royal Decree by the Norwegian government sought to set forth criteria for measuring the territorial waters based on measurements using the outer islands and rocks of the coastal archipelago known as the "skaergaard". Although this decree was general in tenor, it served as a basis for later decrees. In 1869, 1881, and 1889, Royal Decrees set forth what has come to be known as the Norwegian system in further detail. This system consisted of straight baselines drawn between a series of points on islands

[7]J.B. Moore, A Digest of International Law, Vol. I (Washington: Government Printing Office, 1906), p. 720.

or drying rocks along the seaward edge of the skaergaard. The system came to be enforced during the twentieth century as fishermen of other nations ventured into this area in search of a catch. The primary reason for enforcement of territorial waters was protection of the fishing rights of the native Norwegians living along the coast above the Arctic circle.[8]

There were several cases where foreign fishing vessels were apprehended in the 1906-1933 period. British fishing vessels first appeared off the coast of Eastern Finnmark employing fishing gear superior to that of the locals in 1906. To protect native fishermen, a law was passed on June 2, 1906[9], prohibiting foreign fishing vessels from fishing in Norwegian territorial waters. Naval fishery vessels were stationed and instructed to warn or arrest foreign fishing vessels. According to the Norwegian navy, the first warning was given to a British trawler, Golden Sceptre in 1908.[10]

Arrests followed in 1908 with the Lord Roberts incident. There was thereafter an increase with slack periods during the two wars. As Sir Arnold McNair points out in his dissenting opinion to the Anglo-Norwegian Fisheries case:[11]

Between the arrest of the Lord Roberts in 1911 and May 5th, 1949,

[8]International Court of Justice, Reports 1951 (The Hague: International Court of Justice, 1951), p. 124.

[9]Ibid., p. 172.

[10]Ibid., p. 172.

[11]Ibid, p. 173.

sixty-three British and other fishing vessels were arrested in alleged Norwegian waters, and many other were warned.

Waldock traces the evolution of judgements in these cases of arrest of British vessels.[12] Although the rulings in trial courts added to the fragmentary construction of the Norwegian system, its first full description was contained in a 1928 memorandum by the Norwegian government in connection with the 1930 Hague Conference for the Codification of International Law.[13] It stated:

> In accordance with the old concept of the constitutional status of the waters enclosing the "Skaergard", the direction laid down by this decree should be interpreted in the sense that the starting point for calculating the breadth of the territorial sea should be a line drawn along the "Skaergard" between the furthest rocks, and where there is no "Skaergard" between the extreme points. This interpretation of the decree has always been taken as a basis whenever the limits of the territorial sea have had to be fixed in detail (Royal Decree of October 16th, 1869, concerning the waters of the Sunnmore coast).
>
> There is no rule in Norway regarding the maximum distance between starting points of the baselines from which the breadth of territorial waters is calculated. In choosing the places which, according to the Decree of 1812, are to be regarded as the extreme points, the particular circumstances of each part of the coast have been taken into account. These may be historical, economic or geographical factors, such as a traditional conception of territorial limits, the undisturbed possession of the right of fishing exercised by the coastal population since time immemorial and necessary for its subsistence, and also the natural limits of fishing grounds.
>
> In the above mentioned decrees of 1869 and 1889, baselines of 25.9, 14.7, [illegible] and 11.6 nautical miles were fixed.
>
> The question of the fixing of exact baselines for the rest of the Norwegian coast is being studied by the Royal Commission appointed

[12] C.H.M. Waldock, "The Anglo-Norwegian Fisheries Case", British Yearbook of International Law, Vol. 28 (1951), p. 123--4.

[13] League of Nations, Conference for the Codification of International Law Bases of Discussion. Vol. II, Territorial Waters (Geneva: League of Nations, 1929.) p. 126.

[illegible] In this connection, it should even be conceded that all fjords, bays and similar inlets have always been claimed as part of [illegible] territory [illegible], whatever the width at their mouth and no matter whether [illegible] caused by the mainland or by the development of the [illegible] encroaching the starting-points for calculating the breadth of [illegible] water, the baseline chosen is the lowest-water mark.

[illegible] of the 1930 Hague Conference, the Norwegian system [illegible] concerns bordering headlands of considerable length having their [illegible] at the low water mark and on rocks, islands and islets of the [illegible].

Early American [illegible]

At the [illegible] of the North Atlantic Fisheries arbitration, the official [illegible] position was that the reference or baseline for delimitation of [illegible] territorial sea should follow the indentations of the coastline except [illegible] exceeding ten miles in width.[14]

To [illegible] this position, the contention was that no exception was to be made [illegible], except for historic bays.[15] The Commission addressed this [illegible]:

> It was [illegible] further contended by the United States that the renunciation [illegible] only to bays six miles or less in width inter fauces terrae [illegible] as bays only being territorial bays, because the three mile [illegible], as shown by the treaty, a principle of international [illegible] coasts and should be systematically applied to bays.[16]

[14] M.S. McDougal and W.J. Burke, The public Order of the Oceans, (New Haven: Yale, [illegible]) p. 328.

[15] p. 7.

[16] North Atlantic Fisheries Arbitration, op. cit., p. 64.

As has been indicated in the earlier section of this chapter, the American position was not upheld by the Permanent Court of Arbitration.[17] One could charge some inconsistency among American international legalists in view of the earlier statement by John Mason Brown on this subject.[18]

One should recall the recommendation of the Arbitration tribunal with regard to bays:

> In every bay not hereinafter provided for, the limits of the exclusion shall be drawn three miles seaward from a straight line across the bay in the part nearest the entrance at the first point where the width does not exceed ten miles.[19]

The above recommendation was incorporated into the Treaty of 1912 between the United States and Great Britain.[20] Thus the United States acceded to a ten mile rule for bays.

With regard to a baseline for the measurement of the territorial sea, the United States has long favored a reference to the low water mark on the coast, thus causing the baseline of reference to follow the sinuosities of the coast except where a bay exists justifying the use of the ten mile straight line of the closing rule. This was well summarized by the Secretary of State during the California case:

(a) In any case of a relatively straight coast, with

[17] p. 7.

[18] p. 8

[19] Note 4.

[20] United States Congress, Senate, Document 348, Vol. III, 61st Cong., 4th Sess. (Washington: Government Printing Office, 1911), p. 2635.

no special recognized features such as indentations or bays, the Department of State has traditionally taken the position that territorial waters should be measured from the low water mark along the coast. This position was taken as early as 1866 (The Secretary of State, Mr. Bayard, to Mr. Manning, Secretary of the Treasury, May 25, 1886, J Moore, Digest of International Law, 720). It was maintained in treaties concluded by the United States (See Article I of the Convention concluded with Great Britain for the Prevention of Smuggling of Intoxicating Liquors on January 23, 1924, 43 Stat 1761).[21]

Many of the American views on delineation of territorial waters, on offshore islands, bays and baselines stem from the 1930 Hague Conference. The remainder of this chapter will deal with the preparations for and deliberations at that Conference.

III. THE HAGUE CONFERENCE OF 1930

On the occasion of the Hague Conference for the Codification of International Law, the United States advanced a method for delineation of the territorial sea.

The American Proposal

The essence of the proposal submitted on March 27, 1930, was the use of arcs of three mile radius drawn from points on the coast to determine the outer limit of the territorial sea. It was predicated, of course, on a three mile breadth for the territorial sea and avoided the use of baselines along the coast. Specifically, it read:

Except as otherwise provided in this Convention, the seaward

[21]Letter from Department of State to Department of Justice, November 13, 1951, in S.L. Shalowitz, Shore and Sea Boundaries, Vol I. (Washington: Government Printing Off., 1962), p. 354.

> limit of the territorial waters is the envelope of all arcs of circles having a radius of three nautical miles drawn from all points on the coast (at whatever line of sea level is adopted in the charts of the coastal), or from the seaward limit of those inland waters which are contiguous with the territorial waters.[22]

The rationale for the proposal was a most practical one, based on the ease of determining the limits of the territorial sea, hence the end of international waters, by the navigator or mariner. The appeal of the system advanced here is in the removal of a requirement for marking territorial waters on charts. Boggs,[23] in his discussion of the American proposal, aptly shows its superiority over other systems for the navigator. As he pointed out:

"In fact any system for delimiting territorial waters must be derived geometrically from the coastline."[24]

With regard to bays and estuaries, the United States proposal, without attempting to define the terms, addressed indentations so as to determine where the waters therein may be divided as territorial, or international. The proposal was three-fold:

> (1) On a chart or map a straight line not to exceed ten nautical miles in length shall be drawn across the bay or estuary as follows: The line shall be drawn between two headlands or pronounced convexities of the coast which embrace the pronounced indentation or concavity comprising the bay or estuary if the distance between the two headlands does not exceed ten nautical miles; otherwise the line shall be drawn

[22]Boggs, op. cit., p. 544.

[23]Ibid, p. 545ff.

[24]Ibid, p. 545.

through the point nearest the entrance at which the width does not exceed ten nautical miles;

(2) The envelope of all arcs of circles having a radius equal to one-fourth the length of the straight line across the bay or estuary shall then be drawn from all points on the coast of the mainland (at whatever line of sea level is adopted on the charts of the coastal state) but such arcs of circles shall not be drawn around islands in connection with the process which is next described;

(3) If the area enclosed within the straight line and the envelope of the arcs of circles exceeds the area of a semi-circle whose diameter is equal to one-half the length of the straight line across the bay or estuary, the waters of the bay or estuary inside of the straight line shall be regarded, for the purposes of this convention, as interior waters; otherwise they shall not be so regarded.

When the determination of the status of the waters of a bay or estuary has been made in the manner described above, the delimitation of territorial waters shall be made as follows: (1) if the waters of the bay or estuary are found to be interior waters the straight line across the entrance or across the bay or estuary shall be regarded as the boundary between interior waters and territorial waters, and the three-mile belt of territorial waters shall be measured outward from that line in the same manner as if it were a portion of the coast; (2) otherwise the belt of territorial waters shall be measured outward from all points on the coast line; (3) In either case arcs of circles of three-mile radius shall be drawn around the coasts of islands (if there be any) in accordance with provisions for delimiting territorial waters around islands as prescribed in Article . . .[25]

As a final matter, the American proposal provided for pockets of high seas which would remain as a result of application of the method of the proposal to bays and estuaries, indentations or among groups of islands. The proposal, regarding this problem, stated:

(1) Where the delimitation of territorial waters would result

[25]Boggs, op. cit., p. 551.

In leaving a small area of high sea totally surrounded by territorial waters of one or more states; the area is assimilated to the territorial waters of such state or states.

(E) Where the delimitation of territorial waters, as prescribed in the foregoing articles, results in a pronounced concavity such that a single straight line, not more than four nautical miles in length, drawn from the envelope of the arcs of circles on lone side to the envelope of the arcs of circles on the other side entirely closes an indentation, the coastal state may regard the body of water enclosed within the envelopes of the arcs of circles and said straight line as an extension of its territorial waters if the area exceeds the area of a semi-circle whose diameter is equal to the length of the straight line; if the coastal state chooses to assimilate those waters it shall notify the nations which may be interested therein.[26]

Thus the United States presented a proposal for delimitation of the territorial sea which although complex in description, afforded a practical means for ships on the sea to determine their location with respect to the territorial sea of a coastal state. The feasibility of a system with such a multitude of corollaries was to be determined. Also to be ascertained was the political acceptability of a system oriented towards the seaman, not the protectors of national sovereignty.

Other Proposals at the 1930 Conference

As might be expected, the American proposal evoked considerable discussion at the Conference. During the deliberations, two other proposals were advanced pertaining to delimitation of the territorial sea. Both related to indentations or bays.

[26] Ibid., pp. 552-553.

The French delegation offered a compromise-proposal to deal with indentations on a coast:

> In the case of indentations where there is only one coastal State, the breadth of the territorial sea may be measured from a straight line drawn across the opening of the indentation provided that the length of the line does not exceed ten miles and that the indentation may properly be termed a bay.
>
> In order that an indentation may be properly termed a bay, the area comprised between the curve of the coast and its chord must be equal to or greater than the area of the segment of the circle at its middle, at a distance from the chord equal to the distance which separates this point from one end of the curve.[27]

Sometimes known as the "segmental rule", this would permit indentations much shallower than those of the American proposal to be classified as bays. A proposal by the German delegation sought to set a minimum on the depth of bays to which the ten mile rule was to be applied. In that regard, it stated, "This rule shall apply to bays the length of which is not less than five marine miles, reckoned from the above-mentioned line.[28]

IV. ACCOMPLISHMENTS OF THE HAGUE CONFERENCE

It would be unfair to state blandly that nothing was accomplished at the 1930 Hague Conference with regard to the law of the sea. It is accurate to say this in the sense that no agreement was reached, but the

[27]League of Nations, Conference for the Codification of International Law, Acts of the Conference, Vol V. (The Hague: League of Nations, 1930), p. 219.

[28]Ibid., p. 186.

work of the conference, and many of the committee drafts have endured to the extent that they have been referred to in subsequent deliberations and conferences.

Issues which deal with straight baseline systems are those relating to the establishment of baselines for reference in measuring the territorial sea, to bays, to historic waters, and to off-shore islands and archipelagos.

The U.S. proposal pertaining to baselines on which to base measurements of the territorial sea has been discussed earlier in this chapter. It was evaluated in the words of its principal author:

> . . . the problems involved in delimiting territorial waters should be studied objectively, from every aspect and especially that of the navigator, with a view to simplicity, impartiality of results and economy in publication. The American proposal is to be regarded as a first attempt in that direction and it is to be hoped that it may serve, when improved by constructive criticism, as the basis of a definite system which may be found capable of general application.[29]

With regard to bays, the two methods of determining closing lines and delimitation of territorial waters were offered as has been discussed earlier. The American semi-circle rule and the French segmental method varied as to the radius of the circle employed and its construction, but both provided for a ten mile closing line. Most of the delegations at the conference agreed "to a width of ten miles provided a system were

[29]Boggs, op. cit., p. 555.

simultaneously adopted under which slight indentations would not be treated as bays."[30] As Shalowitz points out,[31] the French proposal, since it allowed for extremely shallow indentations, would appear in variance with the consensus.

There was no agreement reached on bays. Strohl has tabulated the achievements as:

> (a) The need for definition of a bay was brought out clearly.
>
> (b) The semi-circular rule was originated albeit within a context that in itself was confusing and politically unworkable.
>
> (c) The complexities of the problem came more clearly to be appreciated. No doubt implicit in such appreciation was the germ of an idea that codification of a law of bays was a task not to be entrusted to jurists alone - - or for the matter, to technical experts along.[32]

It was obvious from the fact that opinions differed among the three major powers present; Britain, France, and the United States; that discussion was the most which could be hoped for from the Conference, with regard to bays.

An interesting proposal was made with regard to "historic waters". Schucking, the rapporteur of the subcommittee dealing with law of the territorial sea. The proposal provided for an International Waters Office to register rights to such waters as well as other rights possessed by a riparian state to waters outside its territorial

[30] Acts of the Conference, op. cit.

[31] Shalowitz, op cit.

[32] M.P. Strohl, The International Law of Bays (The Hague: Martinus Nijhoff, 1963,) p. 211.

ans.[33]

The Second Committee of the Codification Conference noted that codification would not affect rights to "historic waters."[34]

Offshore islands were, according to the report of the Second Subcommittee (which treated territorial waters) were defined as separate bodies of land, surrounded by water, which was permanently above the high water mark. It approved the principle that an island has its own territorial belt of waters. This report declined inclusion of such formations only above the surface of the water at low tide as islands,[35] but indicated that they should be considered in delineating the territorial sea when they lie within the territorial sea. Although no convention was arrived of reflecting these decisions, the report of this subcommittee has been employed by the United States in defining its position in later discussions.[36]

An interest in archipelagos was evidenced prior to the Conference by Schucking, who included in the draft convention prepared for the Committee of Experts, appointed by the League of Nations in 1924, the following paragraph:

> In the case of archipelagos, the constituent islands are considered as forming a whole and the width of the territorial sea shall be measured

[33] Acts of the Conference, V, op.cit., pp. 38-41 and 58.

[34] Ibid, Vol III, p. 105.

[35] Ibid, V, p. 219.

[36] Department of State letter, November 13, 1951, op. cit.

from the extent of the archipelago.[37]

In replies to this proposal, several governments indicated that they would be opposed to the acceptance of the archipelago as a single unit. The prevalent views were:

a. Treatment of each island as an individual unit, having its own territorial sea.

b. A single belt of territorial waters could be drawn where the distance between the islands or islets was not in excess of a certain maximum.

c. Treatment of archipelagos as a whole where geographical peculiarities so warranted.

None of these views prevailed over the others at the Conference, where the question of archipelagos was referred, with other controversial questions to the Second Subcommittee of the Second Committee of the Second Committee of the Conference. Lack of any agreement of archipelagos was reflected in the findings of that group which were labeled "observations" and were relatively sterile in language:

> With regard to a group of islands (archipelago) and islands situated along the coast, the majority of the Sub-Committee was of the opinion that a distance of ten miles should be adopted as a basis for measuring the territorial sea outward in the direction of the high sea. . . . The Sub-Committee did not express any opinion with regard to the nature of the waters included within the group.[38]

Thus the 1930 Hague Conference can not be said to have produced

[37] Bases of Discussion, Vol. V. op. cit., p. 142.

[38] Acts of the Conference, Vol. V., p. 219.

any lasting agreement on any issue pertaining to straight baseline systems as a result of their deliberations. The records of the Bases of Discussion, the Reports of the Committees of the Conference and the Acts of the Conference did, however, contain sufficient analysis and treatment of these issues to provide a foundation for later deliverations on these issues. The first such development to follow the 1930 Conference which was to be of particular significance to the concept of straight baselines was the Anglo-Norwegian Fisheries case.

CHAPTER III

THE ANGLO-NORWEGIAN FISHERIES CASE

The 1930 Hague Conference had raised some interesting questions pertinent to the law of the sea. Although no convention had been arrived at, the Conference had been instrumental in baring the divergence of viewpoint on issues related to a reference from which to measure the breadth of the territorial sea. The issue of straight baselines had been mentioned, but had not developed into an international legal problem. The related issues - bays, archipelagos, offshore islands - were discussed.

Straight baseline systems were to gain prominence as a result of a judicial test of the Norwegian system[1]. This test was the Anglo-Norwegian Fisheries case, on which the International Court of Justice rendered judgement on December 18, 1951.

I. BASIC ISSUES

The Anglo-Norwegian Fisheries case came to be tried by the International Court of Justice as a result of an application by the Government of the United Kingdom submitted on September 28, 1949, which asked for a test of legality under principles of international law of the limits of a Norwegian Fisheries zone established by Royal Decree.

[1] pp. 9 - 12.

of the Government of Norway on July 12, 1935. The zone existed along the coast of Norway north of Latitude 66 28.8' North and was formed by a series of perpendiculars drawn from the outer islands and rocks along the Norwegian coast known as the skaergaard, and from baselines drawn between these islands. The baselines thus established the reference for a four mile belt of territorial waters.

The Application by the United Kingdom accepted compulsory jurisdiction of the Court under Article 36, paragraph 2 of the Charter of the United Nations and asked the Court:

> (a) to declare the principles of international law to be applied in defining the base-lines, by reference to which the Norwegian Government is entitled to delimit a fisheries zone, extending to seaward 4 sea miles from those lines and exclusively reserved for its own nationals, and to define the said base-lines in so far as it appears necessary, in light of the arguments of the parties, in order to avoid further legal difference between them;
>
> (b) to award damages to the Government of the United Kingdom in respect of all interferences by the Norwegian authorities with British fishing vessels outside the zone which, in accordance with the Court's decision under (a), the Norwegian Government is entitled to reserve for its nationals.[1]

The Court, in reviewing the arguments of the United Kingdom and Norway, defined the real issues as contained in points (12) and (13) of the United Kingdom conclusions, namely:

> (12) That Norway is not entitled, as against the United Kingdom, to enforce any claims to waters not contained in the preceding principles. As between Norway and the United Kingdom, waters off the coast of Norway

[1]International Court of Justice, Reports (1951), (The Hague: International Court of Justice, 1951), pp. 118-119.

north of parallel 66 22.8' N., which are not Norwegian by virtue of the above mentioned principles are high seas.

(13) That the Norwegian Royal Decree of 12th July, 1935, is not enforceable against the United Kingdom to the extent that it claims as Norwegian waters (internal or territorial waters) areas of water not covered by Nos. (I) - (II).[3]

Points I-II referred to in the conclusions by the United Kingdom outline the concept of delineation of territorial waters adhered to by the United Kingdom. They constitute the basis for the United Kingdom claim. They are, therefore quoted as the United Kingdom position on baselines at the outset of the Anglo-Norwegian Fisheries case:

(1) That Norway is entitled to a belt of territorial waters of fixed breadth -- that breadth cannot, as a maximum, exceed 4 sea miles.

(2) That, in consequence, the outer limit of Norway's territorial waters must never be more than 4 sea miles from some point on the base-line.

(3) That, subject to Nos. (4), (9), and (10) below, the base-line must be the low-water mark on permanently dry land (which is part of Norwegian territory), or the proper closing line (see No. (7) below) of Norwegian internal waters.

(4) That, where there is a low-tide elevation situated within 4 sea miles of permanently dry land, or the proper closing line of Norwegian waters, the outer limit of Norwegian territorial waters may be 4 sea miles from the outer edge (at low tide) of this low tide elevation. In no other case may a low-tide elevation be taken into account.

(5) That Norway is entitled to claim as Norwegian internal waters, on historic grounds, all fjords and sunds which fall within the conception of a bay as defined in international law, whether the proper entrance to the indentation is more or less than 10 sea miles wide.

[3] I.C.J. Reports, op. cit., pp. 121-123.

(6) That the definition of a bay in international law is a well-marked indentation, whose penetration inland is in such proportion to the width of its mouth as to constitute the indentation more than a mere curvature of the coast.

(7) That, where an area of water is a bay, the principle which determines where a closing line should be, is that a closing line should be drawn between the natural geographic entrance points where the indentation ceases to have the configuration of a bay.

(8) That a legal strait is any strait which connects two portions of the high seas.

(9) (a) That Norway is entitled to claim as Norwegian waters, on historic grounds, all the waters of the fjords and sunds which have the character of legal straits.

(b) Where the maritime belts drawn from each shore overlap at each end of the strait, the limit of territorial waters is formed by the outer rims of these two maritime belts. Where, however, the maritime belts so drawn do not overlap, the limit follows the outer rims of each of these two maritime belts, until they intersect with the straight line, joining the natural entrance points of the strait, after which intersection of the limit follows that straight line.

(10) That, in the case of the Vestfjord, the outer limit of Norwegian waters, at the southwesterly end of the fjord, is the pecked green line shown on Charts Nos. 8 and 9 of annex 35 of the reply.

(11) That Norway, by virtue of her historic title to fjords and sunds (see Nos. (5) and (9) above), is entitled to claim, either as internal or as territorial waters, the areas of water lying between the island fringe and the mainland of Norway. In order to determine what areas must be deemed to lie between the island fringe and the mainland, and whether these waters are internal or territorial waters, the principles of (6), (7), (8), and (9)(b) must be applied to the indentations between the island fringe and the mainland -- those areas which lie in indentations having the character of bays, and within the proper closing lines thereof, being deemed as internal waters; and those areas which lie in indentations having the character of legal straits, and within the proper limits thereof, being deemed to be territorial waters.[4]

[4] I.C.J. Reports, op. cit., pp. 121-122.

Of these points, the first two refer to the extent of the territorial sea of Norway. This was considered by the Court as acknowledged in the course of the proceedings and not relevant to the issue to be addressed. A final point of the United Kingdom conclusions related to compensation to the United Kingdom for arrests of British fishing vessels since the 16th of September, 1948, in such areas found to be high seas by the Judgement of the Court. The two governments agreed to defer treatment of this question to subsequent settlement, should it apply.

The Norwegian position was stated quite simply:

> Having regard to the fact that the Norwegian Royal Decree of July 12th, 1935, is not inconsistent with the rules of international law binding upon Norway, and
>
> having regard to the fact that Norway possesses, in any event, an historic title to all the waters included within the limits laid down by that decree,
>
> May it please the Court,
>
> in one single judgement, rejecting all submissions to the contrary,
>
> to adjudge and declare that the delimitation of the fisheries zone fixed by the Norwegian Royal Decree of July 12th 1935, is not contrary to international law.[5]

Here, then were the issues, which could really be reduced to the submission of the Norwegian Government. In treating the issues, however, the British interpretation of the international law relating to the delimitation of the territorial sea, involving the entire spectrum of issues

[5]I.C.J. Reports, op. cit., pp. 123-124.

associated with an irregular coastline, had of necessity to be addressed. This brought into the deliberations of the Court treatment of concepts involving bays, straits, historic waters and the basic issue of the validity of a straight baseline system as a reference for measuring the breadth of territorial waters.

In its judgement, the Court was to treat, or discount, as it deemed appropriate, all of these issues.

II. JUDGEMENT OF THE COURT

The historic background of the Fisheries case was extensive. The Court was able to establish that British fishermen has refrained from fishing in Norwegian coastal waters from as far back as 1616 -- until 1906. Beginning with a few vessels off Eastern Finnemarek in 1906 and greater number of these vessels in 1908 and onwards, the use of these waters by British fishermen with modern and powerful gear, caused the Norwegian Government, based on complaints of local populace, to take measures to specify the limits within which fishing was prohibited to foreigners. The seizure of a British fishing vessel in 1911 served as impetus for the beginning of negotiations between the two governments. The First World War caused these conversations to be interrupted.

Incidents occurred after the war and although conversations between the two governments were resumed in 1924, both the tempo of British fishing activity and the arrests occasioned thereby increased, culminnting in a memorandum from the British Government to that of

Norway complaining that the baselines used to delimit the Norwegian fisheries zone were unjustified. On July 12th, 1935, the Royal Decree by Norway delimited the fisheries zone north of Latitude 66 28.8' North along the Norwegian coast.

In negotiations resulting directly from the enactment of the Royal Decree, the United Kingdom sought solution of differences on an urgent basis. It was during these discussions that the possibility of referring the case to the Permanent Court of International Justice was raised. In the interim, Norway agreed to deal leniently with British fishing vessels. By 1948, no agreement had been reached by the two governments, and Norway began to rigidly enforce the 1935 decree. As a result of this action, the Application to the International Court of Justice was made by the United Kingdom.

The Royal Decree of 1935 was based on previous decrees of 1812, 1869, 1881, and 1889. It provided:

> Lines of delimitation towards the high sea of the Norwegian fisheries zone as regards that part of Norway which is situated northward of 66 28.8' North latitude shall run parallel with straight base-lines drawn between fixed points on the mainland, on islands or rocks, starting from the final point of the boundary line of the Realm in the eastern part of Varangerfjord and going as far as Traena in the County of Nordland.[6]

The United Kingdom allegations, in points (3) and (4), indicated that the reference for the territorial sea should be permanently dry land, or a low tide elevation within 4 nautical miles of the coast, or permanently dry land. The Court discounted the point involving four

[6] I.C.J. Reports, op. cit., p. 125.

miles, indicating that there was no issue since no land points where used by Norway which were not within four miles of permanently dry land.[7] Further, it was cited:

> The Court has no difficulty in finding that, for the purpose of measuring the breadth of the territorial sea, it is the low-water mark as opposed to the high-water mark, or the mean between the two, which has generally been adopted in the practice of states.[8]

It was apparent to the Court that the Norwegian system was the crux of the dispute. This involved point (8) of the Application by the Government of the United Kingdom, as opposed to the Royal Decree of 1935. Under point (8), it clearly stated:

> The subject of the dispute is the validity or otherwise under international law of the lines of delimitation of the Norwegian fisheries zone laid down by the Royal Decree of 1935 for that part of Norway situated northward of 66 28.8' North Latitude.

and further on:

> . . . the question at issue between the two governments is whether the lines prescribed by the Royal Decree of 1935 as the base lines for the delimitation of the fisheries zone have or have not been drawn in accordance with the applicable rules of international law.[9]

Thus baselines became the main issue. The Court sought to investigate Norway's inauguration of this system and reactions to it in past history.

[7] Ibid., p. 128

[8] Ibid., p. 128.

[9] Ibid., p. 125.

Straight Baselines.

Straight baselines were adjudged by the Court to be the most applicable method of delimiting the territorial sea for the coast in question, because of the extreme irregularities of the skaergaard. The United Kingdom advanced the argument that the preferable method was the arcs of circles[10] method or courbe tangente. The Court pointed out the difficulty in using this method to delimit the territorial sea in the case of the Norwegian coast and the fact that the method was an innovation introduced by the United States at the 1930 Hague Conference. Additionally, it noted that the arcs of circles method was not obligatory under international law. Trace parallele, or following the sinuosities of the coast was considered inapplicable to the very irregular coast and since the United Kingdom, during the proceedings, had abandoned its early espousal of this method, it also was dismissed by the Court. In addressing the straight baseline method, the Court stated that it adhered to the accepted principle that the belt of territorial waters must follow the general direction of the coast and that:

> . . . in order to apply this principle, several states have deemed it necessary to follow the straight baselines method and that they have not encountered objections of principle by other states.[11]

In its judgement, the Court based much of its rationale with regard to straight baseline systems on the last line of the quote above, "they

[10] pp. 14-17.

[11] I.C.J. Reports, op. cit., p. 129.

have not encountered objections of principle by other states". The elements of the judgement can be divided between this approach to the straight baseline method and the discussion of "historic waters", bays and straits.

The Norwegian system, according to the Court, is founded on the Royal Decree of February 22nd, 1812, which said:

> We wish to lay down as a rule that, in all cases when there is a question of determining the limit of our territorial sovereignty at sea, that limit shall be reckoned at a distance of one ordinary sea league from the island or islet farthest from the mainland, not covered by the sea; of which all proper authorities shall be informed by rescript.[12]

The Norwegian Royal Decree of October 16th, 1869, delimited Sunmore, based on the 1812 decree, involving a straight line of 26 miles between the two outermost points of the skaergaard. A decree of September 9th, 1889, related to the delimitation of Romsdal and Nordmore and employed a like method, involving four straight lines, of 14.7, 7, 23.6 and 11.6 miles in length. From these decrees and the statements of reasons which accompanied them, a system began to evolve. Significant to the judgement of the Court is the quote from the Statement of Reasons of the 1869 decree stating:

> My Ministry assumes that the general rule mentioned above (namely, the four mile rule), which is recognized by international law for the determination of the extent of a country's territorial

[12] Ibid, p. 134.

(waters) shall be applied here in such a way that the sea area inside a line drawn parallel to a straight line between the two outermost islands or rocks not covered by the sea, Svinoy to the south and Storholmen to the north, and one geographical league north-west of that straight line, should be considered Norwegian maritime territory.[13]

It is the Statement of Reasons quoted that the Court felt elucidated all the elements of the Norwegian system, that is:

a. Base-points located on islands or islets farthest from the mainland.

b. Straight baselines connecting the base-points without specification as to the maximum length these baselines could have.

Having revealed the foundations of the system, the Court turned to historical evidence which would indicate reiteration of this system to other nations and acceptance of the system by those other nations. Briefly, these included:

a. The San Juan case in 1934 which upheld the Norwegian system and discounted the applicability of the arcs of circles method.[14]

b. Correspondence between Norway and France of December 21, 1869[15], where the Norwegian Government described the straight baseline system and the France apparently accepted the fisheries zone so defined.

c. Norway's abstention from acceptance of the North Sea

[13] Ibid., p. 135.

[14] Ibid.

[15] Ibid., p. 136

Fisheries Convention of 1882 since it would have challenged the Norwegian fisheries zone delimitation.[16]

d. The lack of any opposition to the delimitation of Norwegian territorial waters during the period following the 1812 to the British complaint of 1933, followed by the Applicationof 1948.

The United Kingdom charged inconsistency in the delimitation of Norwegian territorial waters, citing a series of documents circa 1906-1910. The Court disallowed such allegation and affixed the contention of the United Kingdom as a misunderstanding of the term "low-water mark" which that government interpreted as pertaining to system whereby this mark would be employed to follow every sinuosity of the coast. The Norwegian government, however, employed this term merely as the principle to be used where a reference associated with the tide was used.

The Judgement.

With regard to the straight baseline system, the judgement treated two points; first, that of knowledge of the system by the United Kingdom; and second, that of the system with regards to the principles of international law. The Court, speaking in the present tense, noted:

> . . . that in respect of a situation which could only be strengthened with the passage of time, the United Kingdom refrained from formulating reservations.

[16] Ibid. p, 139.

> The notoriety of the facts, the general toleration of the international community, Great Britain's position in the North Sea, her own interest in the question, and her prolonged abstention would in any case warrant Norway's enforcement of her system against the United Kingdom.
>
> The Court is thus led to conclude that the method of straight lines, established in the Norwegian system, was imposed by the peculiar geography of the Norwegian coast; that even before the dispute arose, this method had been consolidated by a constant and sufficiently long practice, in the face of which the attitude of governments bears witness to the fact that they did not consider it to be contrary to international law.[17]

Historic Waters and Bays.

In the judgement with regard to contestations of individual baselines by the United Kingdom, historic waters and bays were treated. The general character of sunds and fjords as historic waters had been admitted by the United Kingdom in its conclusions. Two sectors were addressed in the proceedings; the Svaerholthavet and the Lopphavet.

The issue involved with regard to Svaerholthavet was whether or not the basin between Cape Nordkyn and North Cape, located at the northernmost portions of the Norwegian coast, was a bay. The United Kingdom relied on the definition set forth in point (6) of her conclusions, namely, that the width of the bay was too great in relation to its inland penetration to constitute the character of a bay. On this point, Strohl[18] has pointed out that this is one of the matters which remained unfinished at the end of the 1930 Hague

[17] Ibid., p. 139.

[18] Strohl, op. cit., p.

Conference. The Court, in disagreeing with the United Kingdom view, allowed that although the penetration inland of this basin was only 11.5 nautical miles whereas the width was 38.6 nautical miles, "the basin in question must be contemplated in light of all the geographic factors involved."[19] Here, the jutting peninsulas on each side of the basin were alluded to, thus making distances of 50 and 75 miles inland as the measure between the disputed baseline and the inland penetration. The ruling, as a result was: "The Court concludes that the Svaerholt has the character of a bay."[20]

An interesting point here is that the Court essentially accepted the United Kingdom definition of a bay, while applying it in a manner to override the objection to the basin in question.

With regard to Lopphavet, the Court ruled that the baseline was not in variance with the system since it followed the general direction of the coastline. The claim to the waters involved, as historic waters, was able to be traced to the end of the 17th century when the exclusive right to fish and hunt whales was granted. It was further established that the 1935 Decree in fact delineated a much smaller fishing ground than that reserved before 1812. On this basis, the Court found that the Lopphavet zone was "within bound of what is moderate and reasonable".[21]

[19] I.C.J. Reports, op. cit., p. 141.

[20] Ibid.

[21] Ibid., p. 142.

III. INDIVIDUAL OPINIONS - THEIR IMPORT

There can be no doubt that the judgement of the International Court of Justice in the Anglo-Norwegian Fisheries Case was a momentous one. Although the Norwegian system may be argued to be a very special case and one which related to a unique coastline, the judgement set a precedent in its approval of the straight baseline concept. The decision was not unanimous. Of the fourteen judges presiding, two dissented:

> that the method employed for the delimitation of the fisheries zone by the Royal Norwegian Decree of July 12th, 1935, is not contrary to international law . . .[22]

There were four dissensions:

> that the base-lines fixed by the said Decree in application of this method are not contrary to international law.[23]

There were two individual opinions and two dissenting opinions appended to the judgement. Judges Alvarez and Hsu Mo rendered individual opinions and Sir Arnold McNair and J.E. Read rendered dissenting opinions.

The dissenting opinions vary only slightly in their disagreement with the judgement. Judge McNair dissented on all points involved in the Norwegian system, the straight baseline system, and the use of closing lines for bays which exceeded 10 miles including that of Vestfjord. Judge Read accepted the Norwegian contentions relative to Indreleia

[22] Ibid., p. 143

[23] Ibid.

and Vestfjord, but did not accept either the straight baseline system or the concept of use of straight baselines.

Judge Hsu Mo, although agreeing with the judgement of the Court that the Norwegian system was not contrary to international law, felt that it was not in all cases in conformity with this law. Specifically, he felt that the use of baselines in the case of Lopphavet and Svaerholthavet were examples of straight baselines which could not be justified.

Judge Alvarez gave perhaps the most far reaching opinion. He endeavored to place the proceedings and the judgement in the perspective of the changes which had been experienced by the international system since the Permanent Court of International Justice sat, and in the light of the manner in which he considered international law to be developed. This was perhaps the most telling criticism of the position taken by the United Kingdom. He stated:

> Up to the present, this juridical conscience of peoples has been reflected in conventions, customs, and the opinions of qualified jurists.
>
> But profound changes have occurred in this connection, Conventions continue to be a very important form for the expression of the juridical conscience of peoples, but they generally lay down only new principles, as was the case with the Convention on genocide. On the other hand, customs tend to disappear as the result of the rapid changes of modern international life; and a new case strongly stated may be sufficient to render obsolete an ancient custom. Customary law, to which such frequent reference is made in the course of the arguments, should therefore be accepted only with prudence.

> The further means by which the juridical conscience of peoples may be expressed at the present time are the resolutions of diplomatic assemblies, particularly those of the United Nations and especially the decisions of the International Court of Justice. Reference must also be made to the recent legislation of certain countries, the resolutions of the great associations devoted to the study of the law of nations, the works of the Codification Commission set up by the United Nations, and finally, the opinions of qualified jurists.
>
> These are the new elements on which the new international law, still in the process of formation, will be founded. This law will consequently, have a character different from that of traditional or classical international law, which has prevailed to the present time.[24]

Judge Alvarez had termed the judgement an important one, to all states as well as the parties. The astuteness of this observation has become apparent in the period since the rendering of the decision in this case. Particularly, during the United Nations Conference on the Law of the Sea, to be discussed in the next chapter, was the impact of this decision on all states indicated.

[24]Ibid., pp. 148-149.

IV. THE UNITED NATIONS CONFERENCE ON THE LAW OF THE SEA

When eighty-six nations convened at Geneva on February 24, 1958, for the United Nations Conference on the Law of the Sea, they undertook the most ambitious agenda ever to be attempted by nations dealing with the law of the sea. Where the 1930 Hague Conference had treated only the territorial sea in its dealings with the law of the sea, the Geneva Conference of 1958 had, by the time of its adjournment, dealt with all aspects of that law. The subjects of the four conventions which emerged are testimony to the scope of the achievements: (1) the territorial sea and contiguous zone; (2) the high seas; (3) fishing and conservation of living resources of the high seas; (4) the continental shelf. Of these, the first dealt with by the conference dealt with issues pertinent to straight baseline systems. It was dealt with by the First Committee of the Conference, whose work will be discussed in this chapter.

I. OUTLOOK: THE CONFERENCE OPENS

The First Committee, charged with drafting a convention on the territorial sea and contiguous zone, met on February 26th, 1958. It was not long after the preliminary organizational business had been completed that it became evident that a major underlying controversy existed between the smaller, emerging and less developed nations and the maritime nations. The issue involved was the re-

conciliation of quests for sovereignty over contiguous sea areas by the smaller nations with the desire expressed by the maritime nations for freedom of the seas.

One finds in the preliminary remarks made at the meetings of the First Committee repeated references to the new forces existing in the world which have changed the outlook from that of the traditional law of the sea. Analogous to the anti-colonialism in the General Assembly of the United Nations, these smaller and for the most part, non-maritime nations challenged the hitherto widely accepted three mile rule for the breadth of the territorial sea, sought extension of their sovereignty over adjacent sea areas in a manner reminiscent of the cry of these nations for voice in all international forums. To a great extent, this quest was motivated by a desire to gain assurance that the resources of the seas off their shores would be preserved for the use of their people, many of whom depended heavily on the sea as a major source of protein. There were, in addition, references to enhancement of security in fixing rules for delimiting the territorial sea, and the reference on which such measurement was to be based.

During the initial meetings, it became evident that the judgement of the International Court of Justice in the Anglo-Norwegian Fisheries case was to play an important role in the Convention which would be drafted by this Conference. During the early meetings, no

less than 17 delegates expressed the opinion that baselines were an important issue and 16 referred to the necessity for treating bays.

There was a constructive aspect to the remarks of many of the delegates, who realized the difficulties which would be faced in reaching any agreement on the more controversial issues related to their task. The Brazilian delegate, Gilberto Amado, cogently suggested:

> . . . the Conference should perhaps consider the idea of separating the question of fisheries from that of fisheries and conservation.[1]

He further pointed out the futility of attempting to solve the problem by measures which tended to extend the limits of absolute sovereignty exercised by states over their territorial sea.

The other extreme, that of narrow parochiality, was demonstrated by Dr. Alberto Ulloa Sotomayor, the Peruvian delegate, who in his initial remarks poured forth a rather impassioned defense of the 200 mile breadth of territorial sea claimed by his country, indicting the major powers for their concern for freedom of the sea in peace while abusing that freedom in time of war.[2]

The basic document with which the First Committee was supplied was a Draft Convention adopted by the International Law Commission at its eighth session.[3] This document contained several articles of

[1]United Nations, United Nations Conference on the Law of the Sea, Vol. III, First Committee (Territorial Sea and Contiguous Zone), A/Conf. 13/39 (New York: United Nations, 1958), p. 4.

[2]Ibid., p. 6.

[3]Ibid., Document A. 3159, pp. 209-211.

particular significance to the question of straight baseline systems. Impinging on this question was Article 4, Normal Baseline; Article 5, Straight Baselines; Article 7, Drying Rocks and Shoals; Article 15, Right of Innocent Passage. Of these, perhaps the most basic to this discussion is Article 5:

> 1. Where circumstances necessitate a special regime because the coast is deeply indented or cut into or because there are islands in its immediate vicinity, the baseline may be independent of the low-water mark. In these cases, the method of straight baselines joining appropriate points may be employed. The drawing of such baselines must not depart from the general direction of the coast, and the sea areas lying within the lines must be sufficiently closely linked to the land domain to be subject to the regime of internal waters. Account may nevertheless be taken, where necessary, of economic interests peculiar to a region, the reality and importance of which are clearly evidence by long usage. Baselines shall not be drawn to and from drying shoals.
>
> 2. The coastal State shall give due publicity to the straight baselines drawn by it.
>
> 3. Where the establishment of a straight baseline has the effect of enclosing as internal waters areas which previously had been considered as part of the territorial sea or of the high seas, a right of innocent passage, as defined in Article 15, through these waters shall be recognized by the coastal State in those cases where the waters have normally been used for international traffic.

The influence of the Judgement of the International Court in the Anglo-Norwegian Fisheries case is obvious in this article.

Closely related to the straight baselines issue both in the Fisheries case and in the Conference was the problem of bays. The draft article 7 was broad in tenor, but set forth 15 miles as the

acceptable length of a closing line for bays and left conspicuously vague the definition of an "historic bay". In their opening remarks the delegates commented on the former of these and alluded to the latter. The historic bay issue appeared to be of particular interest to the Panamanian and Saudi Arabian delegates. Mr. Rubio of Panama and Mr. Shukairi of Saudi Arabia brought up this point early in the conference. Panama eventually introduced a proposal, later to withdraw it to join with India in drafting a resolution which asked that the General Assembly arrange for a study of the juridical regime of historic bays.[4]

II. PROGRESS: THE CONFERENCE AT WORK

Straight Baselines.

In the early stages of the Conference, straight baselines had been mentioned repeatedly and it became apparent that despite the relative newness of the concept to international law, it had been generally accepted by all nations commenting. There was, however, considerable difference of opinion on the extension of such systems and the specifics of the delimitation of baselines where such systems were used.

[4] Ibid., A/Conf. 13/C.1/L.158/rev.1, p. 252. The study was completed in 1962 and is contained as Doc. A/CN.4/143 in International Law Commission, Yearbook 1962, Vol. II, (New York: United Nations, 1964) pp. 1-26.

Early in the conference, it was decided that the low-water line would constitute the normal baseline. The straight baseline system of the Anglo-Norwegian Fisheries judgement emerged in general, but reference to this system as a special regime was deleted. The United Kingdom sought to affix a maximum length of 10 miles for baselines in a straight baseline system. The second sentence of the British proposal for Article 5 was approved, as amended, providing for a 15 mile limit on the length of baselines. The portion of the Article dealing with such length then read:

> Except where justified on historic grounds or imposed by the peculiar geography of the coast concerned, the length of the straight baseline provided for in paragraph 1 shall not exceed fifteen miles.[5]

On review of the First Committee Report at the Plenary Meeting of the Conference, the Canadian delegate pointed that the fifteen mile maximum constituted an arbitrary limit and that such a provision was neither necessary nor desirable, since the decision of the International Court of Justice in the Anglo-Norwegian Fisheries case had established the jurisprudence and defined the circumstances in which cases coming under paragraph 2 might be considered. To depart from such legal bases would be undesirable.[6]

The Union of Soviet Socialistic Republic and Indonesian delegates spoke in support of the Canadian proposal for a separate vote on this paragraph. The Conference voted to delete it and to retain the remainder of the wording of article 5.

[5]Ibid., A/Conf. 13/C.1/L.168/Add. 1, Annex, p. 258.

[6]United Nations, United Nations Conference on the Law of the Sea. Official Records. Vol. II. Plenary Meetings, A/Conf. 13/38, (Geneva:

The prohibition in the draft Convention, Article 5, which prevented the drawing of baselines from drying rocks and shoals caused considerable discussion. Britain and the Netherlands supported retention of this restriction. In a proposal by the United States, deletion of this restriction was recommended on the grounds that three of the base-points of the Norwegian system were drying rocks and that the findings of the International Court of Justice in the Fisheries case were in variance with the restriction for that reason.[7]

A related proposal by the Mexican delegation provided that:

> Baselines shall not be drawn to and from rocks, shoals or other elevations which are above water at low tide only, unless lighthouses or similar installations which are permanently above sea level have been built on them.[8]

This amendment was adopted by the Committee as part of the approved amendments.

Bays.

Closely related to straight baseline systems is the issue of bays. In the Fisheries dispute they figured intimately in the Norwegian system.[9] The two points pertaining to bays which were addressed at the Geneva Conference of 1958 were the length of the closing line and the definition of the historic bay. The latter has

[7] A/Conf. 13/39, op. cit., pp. 235-235.

[8] Ibid., p. 239.

[9] pp. 36-37

been discussed above. The closing line issue became a contest between the traditional maritime powers and the emerging nations, the latter supported by the communist nations. The maritime nations favored the ten mile closing line, based on the practical consideration of normal vision at sea. Proposals of other nations did not indicate a consensus as to any single length, though all agreed to a "greater than ten mile" version. The Draft by the International Law Commission proposed fifteen miles as a closing line, but the feelings of the nations represented appeared to be divided among those who advocated the ten mile line and those who advocated some length greater than fifteen miles (twenty-four or more).[10] The Soviet Union, Poland and Bulgaria went so far as to offer a three power proposal[11] to make closing lines at maximum eighty miles in length. This appeared to be a counterploy to "twenty-four" miles suggested by Guatemala.[12] The three country proposal, as amended by the Guatemalan proposal, was adopted by a margin of four votes. This could be considered a significant victory for the advocates of a twelve mile breadth for the territorial sea, from which the twenty-four mile closing line was derived.

Islands.

The question of islands was treated in two ways. First, the

[10] A/Conf.13/39, op. cit., p. 209.

[11] Ibid., Document A/Conf.13/C.1/L/103, p. 144.

[12] Ibid., Document A/Conf.13/C.1/L.105, p. 145.

definition of what an island consisted of was set forth.

The Draft of the International Law Commission stated:

> Every island has its own territorial sea. An island is an area of land, surrounded by water, which in normal circumstances is permanently above the high water mark.[13]

The problems of islands in the territorial sea were pointed out by the Burmese delegation. Their concern was that in some situations an island of one state would possibly lie within the territorial sea of another state. A proposal[14] was introduced to modify the first sentence of the draft to provide for the"median line" solution in such cases. The United States delegation, however, pointed out the inapplicability of the concept that each island might have its own territorial sea where it lay within a straight baseline. Further, it was proposed that emphasis be made on the necessity for an island to be a "natural formation". This would preclude extension of the territorial sea "merely by creating artificial 'areas of land' beyond their established limits".[15]

The Article, by the United States proposal read:

> An island is a naturally-formed area of land, surrounded by water, which is above water at high tide. The low-tide line on an island may be used as a baseline.[16]

[13] Ibid., A/3159, p. 210

[14] Ibid., A/Conf. 13/C.1/L/3, p. 212.

[15] Ibid., p. 162.

[16] Ibid., A/Conf. 13/C.1/L.112, p. 242.

The last sentence of this paragraph was deleted by the United States on comment by the French delegate that it was in conflict with the proposal by the United States on Article 4 which stated that the baseline was the low-tide line "on the mainland".[17] The Burmese proposal was rejected.

Archipelagos.

Although it had not been addressed in the Draft provided by the International Law Commission, the Indonesian delegate expressed the opinion that the Conference should discuss the application of straight baseline systems to archipelagos.[18] His initial mention of this was a rather cursory one. It was after the remarks of Arthur Dean, the United States delegate, that the depth of Indonesian feeling on this subject became known. Mr. Dean stated, in effect:

> The Committee should bear in mind that whatever was added to an individual State's territorial waters must inevitably be subtracted from the high seas, the common property of all nations. For example, if islands were treated as archipelagos according to the straight baseline system, then areas of the high seas formerly used by ships of all countries would be unilaterally claimed as territorial waters or possibly internal waters. It would be a misnomer to describe such restrictions on the free use of the high seas as "progressive" measures. His delegation was ready to listen with understanding to the views of others, but hoped that the views of the Maritime Powers would likewise receive full and fair consideration.[19]

This was taken as an affront by the Indonesian delegate, who

[17] Ibid., A/Conf.13/C.1/L.82, p. 236.

[18] Ibid., p. 14.

[19] Ibid., p. 25

responded at a subsequent session. He repeated his reference to the neglect of archipelagos in discussions on delimitation of the territorial sea and indicated the complexity of attempting to ascertain the limits of the territorial sea where some 13,000 islands were involved. He advanced the thesis:

> . . . an archipelago being essentially a body of water studded with islands rather than islands with water around them. The delimitation of its territorial sea had to be approached from a different angle. In the opinion of the Indonesian government, an archipelago should be regarded as a single unit, the water between and around the islands forming an integral whole with the land territory.[20]

The approach of the Indonesian government was not new. It had been treated extensively at the 1930 Hague Conference[21] by various international law authorities. Typical of these are those of the International Law Association by Judge Alvarez in 1924 and of the American Institute of International Law in 1926. Judge Alvarez stated:

> Where there are archipelagos the islands thereof shall be considered a whole, and the extent of the territorial waters laid down in Article 4 shall be measured from the islands most distant from the centre of the archipelago.[22]

The American Institute of International Law proposed:

> In the case of an archipelago, the islands and keys composing it shall be considered as forming a unit and the extent of territo-

[20] Ibid., p. 45.

[21] United Nations, United Nations Conference on the Law of the Sea, Official Records, Vol. I. Preparatory Documents, A/Conf.13/37, (Geneva: United Nations, 1959), pp. 289-302.

[22] Report of 33rd Conference of the International Law Association, p. 226, cited in Ibid., p. 291.

rial waters referred to in Article 5 shall be measured from the islands farthest from the center of the Archipelago.[23]

Absent from these statements was any reference to a maximum length for a baseline. Opinion on the subject of a maximum length was divided in the International Law Commission. In that body, Professor J.P.A. Francois proposed certain provisions for archipelagos, introducing the idea of a maximum length for baselines.[24] Such a concept was obviously in variance with the International Court of Justice, which had dismissed the idea of a maximum length for baselines in the Fisheries case. It is significant that the treatment of the subject was omitted from later drafts of the proposed convention. The Indonesian delegation did not revive the issue of archipelagos at the conference.

On March 26th, however, the Yugoslav delegation introduced a proposal which would have added two paragraphs to Article 10 to take into account archipelagos:

> 2. The provisions of articles 4 and 5 also apply to islands.
>
> 3. The method referred to in article 5, of straight baselines joining appropriate points on the coast of islands facing the high seas shall be applied in the same way to groups of islands distant from the coast. The areas within such lines and islands shall be considered as internal waters of the islands.[25]

On April 1, 1958, the Philippine delegation introduced an amendment to Article 5 which would have taken into account archipelagos.

[23] American Journal of International Law, Spec. Supp. 20, 1926, pp. 318-319, cited in Ibid., p. 291.

[24] Ibid., p. 292.

[25] A/Conf.13/39, op. cit., Document A/Conf. 13/C.1/L.59, p. 227.

It presented two versions, the primary of which read:

> The method of straight baselines shall also be applied to archipelagos, lying off the coast, whose component parts are sufficiently close to one another to form a compact whole and have historically been considered collectively as a single unit. The baselines shall be drawn along the coast of the outermost islands, following the general configuration of the archipelago. The waters within such baselines shall be considered as internal waters.[26]

The Philippine delegation withdrew this proposal on April 15th, 1958. Subsequently, on April 17th, the Yugoslav delegation withdrew its proposal relative to paragraph 3, as a result of the withdrawal of the Philippine proposal. The Danish delegation reintroduced the Yugoslav proposal, but after discussion which indicated that the conference would not support it, again withdrew it.

The United Kingdom, supported by Yugoslavia, pointed out the complexity of the archipelago question, causing its failure of solution both by the 1930 Hague Conference and by the International Law Commission. Further, it stated:

> It was particularly complex in the case of oceanic -- as opposed to coastal archipelagos, some of which were compact groups of islands with overlapping territorial sea, while others were widely scattered. The application of the principle embodied in the former Yugoslav proposal to widely scattered groups would enclose huge areas of water wholly out of proportion with the land area. Nor would the position be greatly simplified by the new limit to the length of straight baselines stipulated in Article 5, for wholly artificial baselines might be drawn between mere reefs and atolls. In those circumstances, the United Kingdom delegation would prefer to see the matter held over for special study, in the same manner as the question of historic bays.[27]

[26] Ibid., Document A/Conf. 13/C.1/L/98, p. 239.

[27] Ibid., pp. 162-163.

Archipelagos, the, became one of the untreated issues in the Convention on the Territorial Sea and Contiguous Zone.

Innocent Passage.

Wherever the territorial sea or internal waters exist, innocent passage is a recurrent problem. It is particularly acute where the limits of either the territorial sea or internal waters may be changed extensively as in the case of the application of a straight baseline system. The draft of paragraph 3 of Article 5 was on the whole accepted.[28] In the final draft, it became paragraph 2 of a new article 5:

> Where the establishment of a straight baseline in accordance with Article 4 has the effect of enclosing as inland waters areas which had previously been considered as part of the territorial sea or of the high seas, a right of innocent passage as provided in articles 14 to 23, shall exist in those waters.

The question of what could be construed as innocent passage was a more complex one. In the context of fishing vessels, it was decided after much discussion to relate passage of these vessels to such laws and regulations a coastal State might make and publish. This approach was taken after it was realized that there was much variance among states or practice related to foreign fishing vessels. Non-innocent passage in relation to fishing vessels was directly related to engaging

[28]U.S. Congress, Senate, Four Conventions and an Optional Protocol, Formulated at the United Nations Conference on the Law of Sea, Executives J through N, 86th Cong. 1st Sess. (Washington: Government Printing Office, 1959), p. 15.

to prohibition fishing. Because of the difficulty in regulating or apprehending offenders, particularly with modern gear quickly dropped and retrieved, discussion centered about the inadvisability of attempting to do this by use of an international convention.[29]

The general meaning of innocent passage was more elusive. The final draft indicated:

> Passage is innocent so long as it is not prejudicial to the peace, good order, and security of the coastal State.[30]

Submarines in particular were singled out. The traditional fear of submarines as a threat to security and the more practical consideration that they can constitute a danger to navigation was pointed out. The Danish delegate expressed this fear:

> Submarines might be a serious danger both to navigation and to the security of the coastal State unless they surfaced while proceeding through narrow straits. The Danish government has always considered that the passage of submarines was not innocent they did not navigate on the surface while passing through territorial waters. Since it was common knowledge that with the advent of atomic energy, commercial submarines might come into service, his delegation would prefer to see paragraph 5 retained in Article 15.[31]

It is interesting that it did not occur to the Conference that some true submersibles might not be designed for efficient speeds on the surface, but for submerged operation. The article as contained in the

[29] Ibid., p. 17.

[30] A/Conf.13/39, op. cit., pp. 76-77.

[31] Ibid., p. 112. Paragraph 5 related to passage of submarines through the territorial sea surfaced.

Convention stated:

> Submarines are required to navigate on the surface and show their flag.[32]

Warships.

Under accepted tenets of international law, a warship is considered immune to jurisdication of any state other than its flag state. This principle was upheld by the Conference. The problem of nuclear weapons was brought up by the Yugoslav delegation. A proposal was introduced which would add wording to Article 24 of the Draft to reflect the opposition of their government to the use of nuclear energy for other than peaceful means.[33] This proposal provided:

> The coastal State may deny exercise of the right of innocent passage through its territorial waters to any ship carrying any kind of nuclear weapons.[34]

This proposal was defeated. Based on the Corfu Channel case judgement by the International Court of Justice, the United Kingdom stated that warships could pass through straits used for international navigation.[35] It was pointed out by several delegations that some notice should be given for warships to pass through territorial waters of a coastal state. Italy cogently pointed out that the articles should be drafted as simply as possible.

[32]U.S. Congress, Executives J through N, Op. cit., p. 17.

[33]A/Conf. 13/39, op. cit., p. 129.

[34]Ibid., Document A/Conf. 13/C.1/L/21, p. 214.

[35]Ibid., p. 129; United Nations, International Court of Justice, Reports 1949, (The Hague: International Court of Justice, 1949), p. 4.

The plenary session reduced the First Committee draft to simplify it, conforming to the principle laid down by Italy and which has repeatedly been proved with regard to international conventions. In the final Convention, it reads:

> If any warship does not comply with the regulations of the coastal State concerning passage through the territorial sea and disregards any request for compliance which is made to it, the coastal State may require the warship to leave the territorial sea.[36]

III. SUMMARY: ACCOMPLISHMENTS AND OMISSIONS

The Conference on the Law of the Sea set forth the international law of the sea to an extent achieved in no previous body or gathering. The First Committee, of interest here, achieved much with relation to straight baseline systems.

With eighty-six nations present, agreement was reached on:

a. A method of applying a straight baseline system to a deeply indented or cut into coast or where a coastal archipelago might exist.

b. Rules for base-points set forth.

c. Innocent passage was provided for where baselines cut off areas which had formerly been high seas.

d. Closing lines for bays, other than "historic bays"

[36]U.S. Congress, Executives J through N, op. cit., p.19.

had been agreed on.

e. Islands had acquired a definition and were subject to the provisions of the articles of the Convention on baselines, where they were sufficiently close to the coast.

Coupled with the formidable achievements at the Conference was an area of impasse, growing out of lingering disagreements not capable of resolution at the Conference. Such areas constitute the omissions. These omissions in the work of the Conference, in addition to failure to agree on a uniform breadth of the territorial sea not relevant to the discussion of baselines, were:

a. A treatment of "historic waters" or "bays", an issue forwarded to the General Assembly for action.

b. Treatment of archipelagos, other than coastal archipelagos, in the content of straight baseline systems.

There are several interesting points which were brought up at the Conference which bear further discussion.

One of these is the establishment of a widespread consensus on straight baseline systems, serving to confirm the acceptance of the judgement of the International Court of Justice in the Anglo-Norwegian Fisheries case. The statements of the delegates, including the United States delegate, indicated that this judgement was accepted by most as international law.

On the other hand, the United Kingdom delegation, while not contesting the judgement, tended to try to ignore it in advocating a maximum

length for baselines in straight baseline systems.

The interest of Indonesia and perhaps even Canada becomes clearer in discussions in subsequent chapters. The Canadian action showed a marked divergence of opinion between this Commonwealth dominion and the mother country.

The problem of ocean archipelagos was brought up by Indonesia and the Philippines. This issue was close to the hearts of these two nations as can be seen by its obvious applicability to the two scattered nations, consisting of islands over a wide area of high seas. It will be discussed in Chapter VI in light of subsequent events.

From the Proceedings of the United Nations Conference on the Law of the Sea, particularly in relation to the work of the First Committee, it can be seen that the new nations sought to gain security for their sovereignty, particularly in the case of those who relied on the sea for foodstuffs or who possessed coastline far beyond the ability of the naval forces of that nation to render secure. Security was sought through extension of sovereignty over areas of the high seas, to an extent which could not be justified under Bynkershoek's dictum, "imperium terrae finiri ubi finitur armorum potestas". In no practical sense could the security of these areas be maintained, though perhaps it is a testimony of their hopes vested in the United Nations to view the sanction of the Conference as an enhancement of such security.

The Conference proceeded with the lessons of the 1930 Hague Conference before them and cogently shied from attempts to codify

controversial concepts on which no agreement could be reached. This was the case with regard to the breadth of the territorial sea; it was also true of the issue of ocean archipelages. As a positive accomplishment, however, there was considerable progress towards determination of common criteria on which to base the measurement of the breadth of the territorial sea when and if a uniform breadth could be agreed upon. The ability of the participants at the United Nations Conference on the Law of the Sea in 1958 to sense the extent to which consensus could be reached based on conditions in the international system and progress to date in multilateral diplomacy resulted in the considerable accomplishment represented by the Four Conventions which emerged.

CHAPTER V

CONTEMPORARY BASELINE CONCEPTS

The dispute over the width of the territorial sea is well known. It has preoccupied coastal nations throughout history. The Second United Nations Conference on the Law of the Sea, held in Geneva in 1960, was taken up almost entirely by debate over a uniform width for the territorial sea and at its conclusion, no agreement had been reached.[1] Fundamental to determination of the limits of the territorial sea and one which will continue to hold significance regardless of the breadth of territorial sea claimed is the location of the baseline on which such a measurement is based. The 1958 United Nations Conference on the Law of the Sea made major strides in achievement of criteria for this reference.

Location of the baseline where the coast is regular is merely a matter of deciding the point on the land from which breadth of the territorial sea is to be measured. The Convention on the Territorial Sea and Contiguous Zone (hereafter termed "The Convention") established this point in Article 3:

> Except where otherwise provided in these articles, the normal baseline for measuring the breadth of the territorial sea is the low-water line along the coast as marked on large-scale charts

[1]United Nations, Second United Nations Conference on the Law of the Sea, Summary Records of Plenary Meetings and Meetings of the Committee of the Whole, A/Conf. 19/8,(Geneva: U.N., 1960)

officially recognized by the coastal State.[2]

There was general agreement on this delineation of baselines where coastlines were regular, being smooth or having no special configuration. The vacuum created here was where no low-water line existed. Previous practice pointed towards use of the high-water line in such cases. This would be in consonance with Boggs[3] who advocated "whatever line of sea level as adopted in the charts of the coastal state". Similar practice was advanced by a Committee of Experts in setting the baseline as:

> the low-water line along the coast as marked on the largest scale chart available, officially recognized by the coastal State. If no detailed charts of the area have been drawn, which show the low-water line, the shoreline (high-water line) should be used.[4]

It would seem difficult for the mariner to deal with the vagaries of the more obscure cases which might occur. The hydrographic data available will always be the criterion for navigating on the high seas. It is unlikely that a state would be able to ascertain its own territorial sea limits based on low water if charts available for the area only show high-water lines. Where low water does exist, mean low water is the normal

[2]U.S. Congress, Senate, Four Conventions and an Optional Protocol formulated at the United Nations Conference on the Law of the Sea, Executives J to N, Inc., 86th Cong. 1st Sess., (Washington: Government Printing Office, 1959), p. 14.

[3]S.W. Boggs, "Delimitation of the Territorial Sea". American Journal of International Law, Vol. 24 (1930, p. 544.

[4]United Nations, Addendum to Second Report on the Regime of the Territorial Sea, Annex 2, A/Conf. 2, 4/61/Add.1, (Geneva: United Nations, 1955), p. 1.

for depth markings and coastline determination in cartography.

The greatest problem of determination of baselines occurs when a coastline has special configurations. These may entail coastal archipelagos, offshore islands, groups of islands forming archipelagos, or indentations forming bays. It is to these situations the most significant issues of straight baselines can be traced.

Archipelagos were not discussed, per se, in the Convention, but are relevant to the straight baseline concept. The types of archipelagos will be discussed in Section II.

Bays which belong to a single state are covered in Article 7 of the Convention. The notable exception to this article is that of historic bays. The significance of this exception in wording the limitation for a closing line to twenty-four miles across the mouth of a bay leaves unsettled many claims to that title of historic bays.

The exception of Article 12 relates to the more general category of historic waters. The whole issue of historic waters, to include historic bays, has long been a difficult one. Section III. of this chapter will deal with the concepts which are now prevalent regarding this category.

I. STRAIGHT BASELINES

Where coasts are not regular, but possess irregularities such as indentations or bays, it is provided in the Convention that straight baselines may be used. Article 4 states:

> 1. In localities where the coast is deeply indented and cut into, or if there is a fringe of islands in its immediate vicinity,

> the method of straight baselines joining appropriate points may be employed in drawing the baselines from which the breadth of the territorial sea is measured.[5]

This is as close to codification in international law that the straight baseline concept has come. Its acceptance at the 1958 Geneva Conference by eighty-six nations was a "giant step" forward in this regard. In describing this, Shalowitz has said:

> The "straight baseline" is a new concept in international law. It has its inception in 1951 with the decision in the Anglo-Norwegian Fisheries case in which the International Court of Justice upheld Norway's method of delimiting an exclusive fisheries zone by drawing straight baselines along the Norwegian coast above the Arctic Circle, independent of the low-water mark. This established a new system of baselines from which the territorial sea could be measured, provided certain geographic situations obtained. This system with certain modifications was approved by the 1958 Geneva Conference on the Law of the Sea.[6]

It is the opinion of Shalowitz that straight baselines refer to a system only to be used where geographical conditions so justify a departure from the rule of the tidemark, i.e., use of the low-water mark. He goes so far as to say:

> Even where a straight line is drawn across an indentation it does not fall within the category of "straight baselines". Such a line where applicable applies to a single coastal configuration and may be encountered along any coast.[7]

[5]U.S. Congress, Senate, Four Conventions and an Optional Protocol Formulated at the United Nations Conference on the Law of the Sea, Executives J to N, 86th Cong. 1st Sess., (Washington: Government Printing Office, 1959), p. 14.

[6]Aaron L. Shalowitz, Shore and Sea Boundaries, Vol. I, (Washington: Government Printing Office, 1962), p. 30.

[7]Ibid.

MacDougal and Burke do not make so sharp a distinction between baselines and straight baselines, but refer to the straight baseline system thus:

> Another, relatively recent, claim is to determine the baseline by drawing straight lines connecting islands, rocks and promontories which constitute components of extremely rugged and complex coastal configurations. The Norwegian claim sustained by the International Court of Justice in the Anglo-Norwegian Fisheries case is, of course, the most prominent illustration, but other states have made claims of the same type.[8]

Colombos in referring to straight baselines does not refer to a system, but uses the term separately.[9] From the tenor of his writing on the subject, he appears to have espoused the United Kingdom objections to the Norwegian system. Ironically, writing in 1954, he stated, of the Fisheries judgement:

> It is suggested, however, that no exaggerated importance should be given to the Court's findings. It cannot be held that it created a precedent since it dealt with a coast which -- as the Court said -- was "exceptional,"[10]

Perhaps the definition contained in the State Department publication on the subject can be considered as an authoritative definition of the straight baseline:

> In a legal sense the straight baseline means far more than "a baseline which is straight". Rather, it is a concept for stimulating the coastline seaward from the normal baseline. In principle the straight baseline is applied by establishing an arbitrary base-

[9] C.J. Colombos, The International Law of the Sea, (3rd Rev. Ed.), (London: Longmans, Green and Company, 1954), p. 93.

[8] M.S. MacDougal and W.J. Burke, The Public Order of the Oceans, (New Haven: Yale, 1964), p. 315.

[10] Ibid., p. 89

line along the headlands of the mainland and outermost points of fringing islands.[11]

II. ARCHIPELAGOS

Archipelagos are very much caught up in the concept of straight baselines, for, by their nature they tend to be deeply indented or to consist of scattered island fringes the existence of which bred the straight baseline concept. The Anglo-Norwegian Fisheries case treated the coastal archipelago. The judgement of the International Court of Justice made it rather simple for the 1958 Convention to also treat the coastal archipelago. It is not referred to as such, but Article 5 is rather obviously applicable to coastal archipelagos.

It is appropriate to discuss the terminology of archipelagos at this point. Evensen has produced one of the few exhaustive treatments of this subject.[12]

Archipelagos may be divided into two categories: coastal archipelagos and ocean archipelagos.[13]

Coastal archipelagos are those so close to the mainland that they may be considered part and parcel of it, constituting an outer

[11]Department of State, Sovereignty of the Sea, Department of State publication 7849, (Washington: Government Printing Office, 1965), p. 12.

[12]Jens Evensen, "Certain Legal Aspects Concerning the Delimitation of the Territorial Waters of Archipelagos", Document A/Conf. 13/18, United Nations Conference on the Law of the Sea, Vol I, Preparatory Documents, A/Conf. 13/37, (Geneva: United Nations, 1959), pp. 289-302.

[13]Evensen calls these "outlying (mid-ocean) archipelagos".

coastline or fringe of islands. As noted above, the most prominent of these in the international system, particularly since the Fisheries case, is the Norwegian Skaergaard, where an outer coastline exists for almost the whole coast of Norway. Similar "skerried" coasts exist, as a result of coastal archipelagos, in Finland, Greenland, Sweden, Yugoslavia, Alaska and Western Canada.

Ocean archipelagos consist of groups of islands which are situated far at sea or at least far enough to be considered as an independent whole. Some of the best known of these are Indonesia, the Philippines, Iceland and Hawaii. Other examples are the Galapagos, the Faeroes, the Fiji Islands, the Solomon Islands and the Svalbard archipelago.

Coastal archipelagos are covered adequately in Article 5 of the Convention in that they qualify as deeply indented coasts, usually an outer coast, or fringes of islands. Ocean archipelagos, as indicated in Chapter IV[14], were not covered in Convention and although several states expressed an interest in doing so, the matter was not pursued at the 1958 Geneva Conference. National actions in this regard will be covered in Chapter VI, but perhaps a box score would be relevant at this juncture.

The following ocean archipelagos are delineated by straight baseline systems: Indonesia, Iceland, Svalbard, the Galapagos.

[14] p.54.

TABLE I

STRAIGHT BASELINE SYSTEMS

Coastal Archipelagos

Nation	Authority
Norway	Royal Decrees of 12 July 1935 and 18 July 1952
Finland	Act of 18 August 1956 Presidential Decree (same date)
Denmark	Neutrality decrees of 27 January 1927 and 11 September 1938 and enactments concerning fishing and hunting in Greenland waters of 1 April 1925, 27 May 1950, 7 June 1951 and 11 November 1953.
Sweden	Customs Regulations of 7 October 1927, together with Royal letter of 4 May 1934.
Yugoslavia	1 December (28 November) 1948.
Saudi Arabia	Article 4 of Royal Decree of 18 January 1951.
Cuba	Decree of 8 January 1934, all islands, islets and reefs extending into the ocean considered part of the main island for delineation of the territorial belt.

Ocean Archipelagos

Indonesia	Presidential Decree of 30 September 1963.
Iceland	Fisheries Regulations of 18 March 1952, note verbale 25 March 1955 to International Law Commission.
Galapagos	Ecuadorian Presidential Decree concerning fisheries of 2 February 1938 and 22 February 1951.

TABLE I (cont'd)

Combination Systems

Nation	Authority
The Faeroes (By arcs of circles and straight baselines)	Agreement of 22 April 1955 between United Kingdom and Denmark

Other Systems

The Bermudas (365 islands and islets)	3 nautical miles from the outer ledge of the archipelago. (International Court of Justice, Pleadings, Anglo-Norwegian Fisheries case, Vol. II, (The Hague: International Court of Justice, 1951,) p. 532.
Philippines	All waters inside outermost islands. notes verbale to International Law Commission, 7 March 1955 and 20 January 1956.
Hawaii	While 16 May 1854 neutrality Proclamation by the King of the Hawaiian islands and that of 27 May 1877 inaugurates a straight baseline system; this is not claimed by the United States which claims a three mile belt of territorial sea around each island.

The ocean archipelago has long been an orphan of international conferences treating the law of the sea. Neither the 1930 Hague Conference nor the 1958 Geneva Conference treated it conclusively. In the preparatory documents for the latter conference, Evensen[15] leaned towards the straight baseline system, but in his general conclusions stated:

> No hard and fast rules exist whereby a State is compelled to disregard the geographical, historical (and economical) peculiarities of outlying archipelagos. . . .
>
> . . . in the writer's opinion, the waters between and inside the islands and islets of the above-mentioned (ocean) archipelago must be considered as internal waters. But where the waters of such an archipelago form a strait, it is in conformity with the prevailing rules of international law that such a strait cannot be closed to traffic.

Some states have quite recently claimed waters around and between islands of ocean archipelagos asinternal waters. They have yet to gain international recognition of their claims by either codification or the acquiescence of states. Major sea powers such as the United States and the United Kingdom have refused to acquiesce to such claims. In the face of such opposition, it remains to be seen whether straight baseline systems for ocean archipelagos heretofor instituted can prevail for long.

Straight baseline systems, with regard to ocean archipelagos and to coastal archipelagos which cannot be treated under Article 5 of the Convention must stand the test of time on a case-by-case basis. For this reason, it cannot be said that any concepts for delineation of internal waters and reference for the measurement of the territorial

[15]Evensen, op. cit., p. 302.

sea, not covered by Article 5, or based on the low-water mark, are universally recognized or accepted.

III. HISTORIC WATERS OR BAYS

The general category of historical claims to waters is that of "historic waters". Gidel has stated that the theory of historic waters is necessary:

> The theory of 'historic waters', whatever name is given, is a necessary theory; in the delimitation of maritime areas, it acts as a safety valve; its rejection would mean the end of all possibility of devising general rules concerning this branch of public international law. . .[16]

He has further indicated that it is exceptional:

> . . . while the theory of historic waters is a necessary theory, it is an exceptional theory. . .[17]

and:

> The coastal State which makes the claim of 'historic waters' is asking that they should be given exceptional treatment must be justified by exceptional conditions.[18]

As a result of the tasking of the International Law Commission by the General Assembly in carrying out the recommendation of the Conference on the Law of the Sea,[19] the Codification Commission of that body performed a study of the Juridical Regime of Historic Waters, including Historic Bays.[20]

[16] Gilbert Gidel, La Droit International Public de la Mer, Vol. III., p. 651, cited in International Law Commission, Yearbook 1962, (New York: United Nations, 1964), Vol. II., p.6.

[17] Ibid., p.7.

[18] Ibid., p.7.

[19] p.45.

[20] International Law Commission, Yearbook 1962, op. cit., p. 1-26.

The findings of this Commission constitute the most up-to-date work on this subject. At the outset, the Commission observed that there was only superficial agreement as to any definition of "historic water" and for this reason, no definition was considered possible. It would be presumptuous for the present writer to attempt to define the terms in light of the failure of so learned and expert a group's reticence to do so. The contemporary concept of "historic waters" and "historic bays" is, however, worthy of discussion with respect to the part they play in straight baseline systems.

Four salient aspects of "historic waters" are addressed in the discussions of this concept.[21] They are:

a. Is the regime of historic waters an exceptional regime?

b. Is the title to "historic waters" a prescriptive right?

c. The relation of "historic waters" to "occupation."

d. "Historic waters" as an exception to rules laid down in a general convention.

To recognize an exceptional aspect to "historic waters" or "historic bays", one must first accept the fact that there is indeed a general rule extant for bays to which there must be an exception. Were there no general rule which placed limitations on the dimensions of

[21] International Law Commission, Yearbook 1962, op. cit., pp. 7-12.

bays such as the closing line rule does the concept of an exceptional regime make sense. There is also the element of acquiescence of other states to the claim to "historic waters". The interesting point is made by the Codification Commission in concluding the treatment of the exceptional nature of this regime:

> It could even be asserted that it is the uncertainty of the legal situation, not the certainty that general rules of international law on the matter exist, which has given rise to the claims which form the factual basis of the theory of "historic waters".[22]

It is considered that while "extinctive prescription" (prescription liberatoire), or loss of a claim by failure to prosecute is within a reasonable time is not relevant to "historic water", "acquisitive prescription" is considered in the regime of "historic waters". Two subcategories of acquisitive prescription exist; immemorial possession and prescriptive right.

At first glance, immemorial possession seems to be applicable to historic waters. In the case of immemorial possession the original title is not certain. Whether a valid title or not, long lapse of time renders it impossible to determine the original legal status.

In the case of prescriptive right, the original title of the claimant is known to be defective. This is said to be akin to usucapio of Roman law. The possessor has enjoyed long and uninterrupted possession for a period of time under conditions which are considered to imply the acquiescence or tacit consent of the rightful title holder. There is

[22] Ibid., p. 11.

considerable lack of agreement as to the length of time involved here, to the extent where doubt is cast on the existence of this category in international law, or since possession cannot be immemorial, the two subcategories can be considered to merge.

The difficulty in attempting to apply this concept to "historic waters" is that the waters in question are claimed by one state by long possession, butdid not in fact belong to another state originally, but were high seas. Thus one state claims waters on the historic basis, while other states claim not that these waters are theirs, but that they are high sea. To apply prescriptive right based on an original defective or invalid title to the waters in that they were high seas by general rules of international law and that by long possession, historic title has been achieved, would amount to considering these "historic waters" an exception to those general rules of international law. From this, the Codification Commission concluded:

> It is to be feared that this (exceptional regime) is usually what is implied when the term "prescriptive right" is used in connexion with "historic waters". In order to avoid that by the use of that term unwarranted assumptions are brought into the argument, it would therefore be preferable not to refer to the concept of prescription in connexion with the regime of "historic waters".[23]

Occupation was deemed relevant to title to historic waters only if it took place before freedom of the high seas became a part of international law. It is generally not accepted as relevant to the high seas,

[23] Ibid., pp. 11-12.

not applied to the acquisition of territory. If however, occupation is invoked as a basis for title, it must be based on a basic original title fortified by long usage.[24]

The 1958 Geneva Convention on the Territorial Sea and Contiguous Zone mentions "historic waters" in Articles 7 and 12. These admit an exception for historic waters when dealing with bays belonging to a single state and for coastal waters of two opposite or adjacent states. The Codification Commission envisaged three hypotheses with regard to historic waters:

> a. Historic title relates to maritime areas not dealt with by the Convention and the Convention consequently has no impact on the title.
>
> b. The historic title relates to areas dealt with by the Convention but is expressly reserved by the Convention. Also in this case the Convention has no impact on the title.
>
> c. The historic title is in conflict with the provision of the Convention and is not expressly reserved by the Convention. In that case, the historic title is superseded as between parties to the Convention.[25]

Having discussed these general aspects of the nature of claims to "historic waters", it becomes necessary to determine the elements which might constitute a title to "historic water". Again, relying on the work of the Codification Commission as certainly the latest and most extensive study of the regime of "historic waters", one can tabulate

[24] Ibid., p. 12.

[25] Ibid., pp. 12-13.

the elements of such a title are:

a. The exercise of authority over the area claimed.

b. The continuity of this exercise of authority over waters in question by the state claiming title.

c. The attitude of foreign states towards the claim.

d. Justification of the claim by vital of historic necessity, national security, vital interest or similar ground.[26]

A state pursuing a claim to waters on historic grounds should be prepared to defend such a claim on the basis of existence of the elements cited. The nature of the waters claimed in the legal sense would relate directly to the nature of the waters in the development of the historic title, i.e., whether title is developed to them as internal waters or as territorial waters. In pursuit of such a claim, effective sovereignty over the waters in question must be proved. In this regard, the "burden of proof" is on the claimant state to prove its claim to the satisfaction of whoever must decide that all the requirements necessary for title are fulfilled. Where two states are involved, it follows that each must prove the validity of its allegation and in this respect, "burden of proof" loses value as a definite criterion.

The variety of claims to historic waters and the propensity for initiation of disputes related to listing historic waters led the Codification Commission to refrain from attempting to produce such a list. Rather

[26]Ibid., p. 13.

it proposed that a procedure for obligatory settlement of disputes relating to "historic waters" be established based on the Conventions of the 1958 Geneva Conference and the optional protocols adopted at that conference and at the 1961 Conference on Diplomatic Intercourse and Immunities, thus placing all disputes within the compulsory jurisdiction of the International Court of Justice.[27]

Thus "historic waters" can be termed as applicable to a claim when invoked in accordance with the Conventions and Protocols referred to above, but on a case-by-case basis. Elements of historic waters must be substantiable before a judging authority, e.g., as suggested above, the International Court of Justice.

The work of the Codification Commission is an interesting and thorough treatment of the whole subject of "historic waters". It reflects the realistic notion, which is perhaps more evident in the 1960s than in the period prior to the 1958 Geneva Conference, that States are moving towards assertion of their sovereignty at the expense of the freedom of the high seas.

In the preparatory documents to the 1958 Geneva Conference, the more narrow subject of "historic bays" is treated, but more in the analytical and historical vein than in an attempt to formulate the concept. In this document,[28] a listing of bays and gulfs is contained, supplying

[27] Ibid., p. 26.

[28] A/Conf.13/37, op. cit., pp. 1-38.

examples, with descriptions of the litigations pertaining to them. The more recent treatment by Strohl does not refer to the work of the Codification Commission which must have been published during preparation of his work for publication. He confines himself to international law pertaining to bays, but in his conclusions on "historic bays", arrives at essentially the same conclusion as the Codification Commission on recommending that the claims be settled by the courts.[29] Although not recommending as the Commission did, the submission of states to obligatory jurisdiction, he proposes the revival of an International Waters Office and Register where all such claims to historic bays would be registered and contests be referred to the International Court of Justice. As a final recommendation, he recommends further study of the problem by a body of technical experts.

One must reflect that Strohl's final conclusion pertaining to a study by a body of experts was in fact accomplished by the Codification Commission. Commander Strohl reveals his point of view in stating:

> While this course of action (compulsory jurisdiction) would probably prove unacceptable to many states at the present time, it is really believed to be the ultimate solution if we are to progress towards an integrated World Society.[30]

[29]Mitchell P. Strohl, The International Law of Bays, (The Hague: Martinus Nijhoff, 1963), pp. 330-331.

[30]Ibid., p. 330.

The comment of the Codification Commission relative to declaration of claims and listing "historic waters"is a more realistic approach to the problem:

> An attempt to establish such a list might induce states to overstate both their claims and their opposition to the claims of other States, and so give rise to unnecessary disputes.[31]

There is a more telling lesson in this than is readily apparent -- first, nations are moving more towards using the sea as a means of asserting sovereignty; and second, an integrated World Society is much further away than it may have appeared in the early 1950s. The liberal view of a solution to the world's problems in our time has become tempered by the realist's view that the international system tends more towards anarchy than towards integration. Pervading consideration of both these views must be the understanding that international legal principles will continue to be dependent on the consensus of power in the international system and codification without this consensus will merely weaken the structure of international law by the generation of principles which are not reflective of the conditions present in the system and which will lose relevancy to actions in the world.

[31] International Law Commission, Yearbook 1962, op. cit., p. 26.

CHAPTER VI

RECENT DEVELOPMENTS

By the end of the United Nations Conference on the Law of the Sea in 1958, there were clear indications that certain counties felt that straight baseline systems could be applied to ocean archipelagos. There had been indications even before this conference that straight baseline systems would probably gain in application, even within the United States. Of the ocean archipelagic nations most prominent in their espousal of the straight baseline concept, Indonesia and the Philippines are the most vivid examples. Many other nations, however, acted to apply straight baselines where the provisions of the Convention on the Territorial Sea and the Contiguous Zone could more clearly be applied. In this chapter, various actions which have occurred in which straight baselines have played a part are discussed.

I. INDONESIA

On December 13, 1957[1], Indonesia indicated by declaration that the waters within her island grouping were internal waters. At the United Nations Conference on the Law of the Sea, the Indonesian representative made a lengthy discourse ostensibly in response to the statement of Mr. Dean, the United States delegate who opposed extension

[1] New York Times, December 13, 1957, p. 1.

of sovereignty at the expense of the high seas. Subardjo's explanation of the concept on which the government of Indonesia based its declaration is contained in Chapter IV.[2] His subsequent remarks are of interest in view of later developments. The summary record of this speech states:

> Indonesia consisted of some 13,000 islands scattered over a vast area. To treat them as separate entities, each with its own territorial waters, would create many serious problems. Apart from the fact that the exercise of state jurisdiction in such an area was a matter of great difficulty, there was a question of communications between the islands. Because of the obvious interdependence of the latter, communications had to be secured in peace as well as war. Moreover, in wartime, the freedom of communications would be seriously threatened even if the archipelagic state was not a belligerent. Events of the Second World War had shown that a neutral flag was no guarantee of freedom of passage.
>
> If each of Indonesia's component islands were to have its own territorial sea, the exercise of effective control would be made extremely difficult. Furthermore, in the event of an outbreak of hostilities; the use of modern means of destruction in the interjacent waters would have a disastrous effect on the population of the islands and on the living resources of the maritime areas concerned. That is why the Indonesian Government believed that the seas between and around the islands should be considered as forming a whole with the land territory, and that country's territorial sea should be measured from baselines drawn between the outermost points of the outermost islands.[3]

There is the obvious belief that the extension of Indonesian sovereignty over the waters between and around the islands of the ocean archipelago will somehow enhance economic and military security. One gains the impression that by designating these waters as internal

[2] p. 51.

[3] United Nations, United Nations Conference on the Law of the Sea, Vol. III, First Committee (Territorial Sea and Contiguous Zone), A/Conf.13/39(New York: United Nations, 1958), p. 43.

waters, security will be gained from general or nuclear warfare by virtue of some kind of international fiat. A salient point to be kept in mind in considering the Indonesian archipelago, or for that matter, any extension of sovereignty over the high seas is the statement of the International Court of Justice, contained in its judgement in the Anglo-Norwegian Fisheries case:

> The delimitation of sea areas has always in international aspect; it cannot be dependent merely on the will of the coastal state expressed in its municipal law.[4]

On August 27, 1963, Indonesia formalized its declaration of territorial waters and formally established a straight baseline system by a Presidential decree[5] entitled, "The Entire Indonesian Territorial Waters Declared as Maritime Area." The purpose of the declaration was stated as:

> . . . for the maintenance of order and security within the territorial waters of Indonesia. . .[6]

The declaration refers to an Indonesian Government Regulation of 1960 concerning Indonesian waters which specifies that the territorial sea will be 12 miles in breadth and will be measured perpendicularly:

> . . . on the baseline, or points on the baseline consisting of straight lines connecting the outermost points at the ebbline of islands or part of islands within the territory of Indonesia with

[4]International Court of Justice, Reports (1951), (The Hague: International Court of Justice, 1951), p. 132.

[5]Government of Indonesia, Presidential Decree No. 103. Year, 1963, The Entire Indonesian Territorial Waters Declared as Maritime Area, (Djakarta: Government of Indonesia, 1963),

[6]Ibid., p. 1.

the understanding that if there is a strait with a width not exceeding 24 miles and Indonesia is not the only border state, the borderline of the territorial sea is drawn in the middle of the strait.[7]

Further, Article 3 stated:

> Innocent passage in the inland seas of Indonesia is open to foreign water transport.[8]

The rationale put forth in the 1960 regulation was very similar to Mr. Suberdjo's comments at the 1958 Geneva Conference. In the considerations which led to the declaration, the Dutch decree of 1939 setting forth a three mile breadth for the territorial sea is cancelled. The nature of the geography, i.e., the ocean archipelago, a claim of historical unity and the need for a "wholeness" constitute some of these considerations. The first three considerations are of particular interest. They state:

> 1. That the geographical structure of Indonesia, as an archipelago consisting of thousands of islands, has a specific character.
>
> 2. That, according to history, since time immemorial, the Indonesian Archipelago has been a unity;
>
> 3. That for the wholeness of the territory of the Indonesian State, all islands and seas situated between them shall be considered as a complete unity.[9]

Indonesia went on to justify the extension of sovereignty over the waters around the islands on economic, sociological, and political ground.

[7]Government of Indonesia, The Indonesian Revolution: Basic Documents and the Idea of Guided Democracy; Special Issue 65 (Djakarta: Department of Information, 1960), cited in Intelligence report 5845047363 of 3 September 1963, by U.S. Naval Attache, Djakarta, p. 2.

[8]Ibid.

[9]Ibid., p. 3.

Economic consequences of the act were described as stemming from the reliance of the Indonesian people on fish for protein, the primitive nature of Indonesian fishing methods and the protection of natural resources on and beneath the bottom of the sea.

Sociological factors were brought forth in relating the mineral and fishing resources to the welfare of the people:

> To the Indonesian people whose diet does not contain enough protein -- even the animal portein substance in their food belongs to the lowest standard -- the natural resources in fishery are of incalculable value. Especially when we consider that the other methods of meeting the shortage of protein, for instance the development of cattle breeding (live stock), are hard to conduct -- and their financing is moreover too expensive -- it is therefore necessary to keep in reserve and to utilize the potential resources in the seas. The methods of catching fish and exploiting the other sea products by the Indonesian people, is up to the present time still too primitive, and this is another reason for taking measures to the effect of protecting these natural resources.[10]

The tenor of justification is set here and reiterated in discussions of fauna and flora, minerals and other ocean bottom resources.

Political rationale for use of the straight baseline system alludes to the difficulty of control of territory.

> Open sea enclaves amidst and between islands within the territory of Indonesia, place the officials assigned to exercise control in a difficult position, as they have to watch all the time whether they are sailing in National waters or in open waters, since their right to act depends on said position.[11]

[10] Ibid., p. 4.

From a military or security standpoint, the approach is employed that leaving international waters around and between Indonesian islands lays the government and populace open to the consequences of naval warfare between major powers, and the possible danger of nuclear warfare. The difficulty of remaining neutral in these circumstances is pointed up:

> In a war between two parties, by the moving to and fro of the fleet of both sides in the open sea between the islands of Indonesia, the wholeness of our country would become jeopardized. Communications between one island and the other which forms the backbone to the people's livelihood in view of the transportation of vital daily consumer goods, would be broken, which would cause sufferings to the people living on those islands. The consequence of a sea battle with nuclear weapons amidst the Indonesian islands would endanger the inhabitants of the islands in the surroundings of the open sea where the battle takes place.[12]

Clearly, the Indonesian government had in mind the Convention on the Territorial Sea and Contiguous Zone when this was written. A great deal of discussion had centered on taking into account "the economic interests peculiar to a region, the reality of which are clearly evidenced by long usage."[13] During the drafting of this convention. Although Indonesia stated an historical claim to these waters, the citation of the 1939 decree delimiting a three mile territorial sea was

[11] Ibid.

[12] U.S. Congress, Senate, Four Conventions, and an Optional Protocol, Formulated at the United Nations Conference on the Law of the Sea, Executives J to N, 86th Cong. 1st Sess. (Washington: Government Printing Office, 1959), p. 14.

rather contradictory.

The international implications of the Indonesian system are signfi-cant. Baselines in the system range in length from 2.8 to 122.7 nautical miles with eleven baselines over 90 nautical miles in length. There are 195 baselines in the system. Major international passages involved are the Sunda Strait between Sumatra and Java and the Macassar Strait, with a large number of minor passages also included in the system. The question of acceptance of such a system immediately arises, for without international acceptance, the Indonesian decree becomes a unilateral declaration only enforceable to the extent of Indonesian power. In the naval field, Indonesia is hardly a significant power. The major powers with interests in the area, the United States and the United Kingdom, have rejected the validity of the Indonesian system as have Australia and New Zealand. To assert the freedom of the seas, these powers have, on occasion, utilized the Sunda and Macassar straits as a demonstration of their conviction that they remain high seas.

It is ironic that only this year Indonesia withdrew from the United Nations, a forum in which some acceptance of a system such as theirs could be realized.

There must then be a limit to the extent to which a straight baseline system can be applied. One wonders whether this could have been achieved, in the case of Indonesia, in a less flamboyant manner by electing to enclose groups of islands into several archipelagic

groupings without including major international straits or enclosing relatively large bodies internationally recognized as high seas. The fact remains, however, that the decree has established unilaterally a straight baseline system enclosing the Indonesian island groups as an ocean archipelago and a single entity.

This leads to consideration of other national actions of similar nature.

II. OTHER NATIONAL ACTIONS

The Indonesian case is the major application of straight baselines since the 1958 Convention was drawn up. There have, however, been actions involving straight baselines in the years between the Anglo-Norwegian Fisheries Judgement and the United Nations Conference on the Law of the Sea and subsequent thereto. The most notable of these are Finland, Iceland, the Philippines, Sweden, and Yugoslavia. There will follow summaries of actions by these nations and others which pertain to straight baseline systems.

The Philippines

One of the most recent national actions involving the concept of straight baselines was that of the Philippines enacted in June 1961.[13] Like the Indonesian move, it seeks to enclose the waters of the island

[13]Philippine Act No. 3046 of 11 June 1961, cited in United Nations, Supplement to Laws and Regulations on the Regime of the Territorial Sea, (New York: United Nations, 1962).

archipelago of the Philippine Islands within baselines drawn from the outermost points of the outermost islands.

The International Law Commission received from the Philippine Government two notes verbale concerning delimitation of territorial waters.[14] Evenson has called the method "unique".[15] Dates of the notes were March 7, 1955 and January 20, 1956. The second of these contained a general delineation which stated:

> All waters around, between and connecting different islands belonging to the Philippine Archipelago, irrespective of their width or dimension, are necessary appurtenances of its land territory forming an integral part of the national or inland waters, subject to the exclusive Sovereignty of the Philippines.[16]

Further, with regard to territorial waters:

> All other water areas embraced within the lines described in the Treaty of Paris of 10 December, 1898, the Treaty concluded at Washington, D.C., between the United States and Spain on 7 November 1900, the agreement between the United States and the United Kingdom of 2 January 1930, and the Convention of 6 July 1932 between the United States and Great Britain, as reproduced in section 6 of the Commonwealth Act 40003 and article 1 . . . of the Philippine Constitution are considered as maritime territorial waters of the Philippines for purposes of protection of its fishing rights, conservation of its fishery resources, enforcement of its revenue and anti-smuggling laws, defense and security, and protection of such other interests as the Phili-

[14]United Nations, Official Records of the General Assembly. 10th Sess., Supp. 9, (New York: United Nations, 1956), p. 36; International Law Commission, Yearbook 1956, Vol. II. (New York: United Nations, 1957,) p. 69-70.

[15]United Nations, United Nations Conference on the Law of the Sea, Official Records, Vol. I. Preparatory Documents, A/Conf. 13/37, (Geneva: United Nations, 1959), p. 299.

[16]International Law Commission, Yearbook 1956, Vol II, p. 70 op. cit.

> ppines may deem vital to its national welfare and security, without prejudice to the exercise by friendly foreign vessels of the right of innocent passage over these waters.[17]

The Conventions referred to set forth the boundaries of the Commonwealth of the Philippines. The extent to which international straits are recognized is not indicated. A note of December 12, 1955, received by the United Nations Secretariat stated identical rationale in almost the same words.[18] To date, no delineation of a straight base-line system, designating lines and base-points, has been made.

At the Second United Nations Conference on the Law of the Sea in 1960, the Philippine delegate referred again to the treaties and conventions cited above as giving the government of the Philippines jurisdiction over all land and sea within the boundaries set forth therein, indicating that no state had protested this. Further:

> Countless generations of Filipinos had derived a large part of their food supply from the waters between and around the islands making up the archipelago, and all these waters; irrespective of their width or extent, had always been regarded as part of the inland waters of the Philippines. Thus, his country's claim to a territorial sea extending to the limits set forth in the Treaty of Paris was based on a historic right and adequately supported by geographic and economical considerations.[19]

[17] Ibid., p. 70.

[18] United Nations, Laws and Regulations on the Regime of the Territorial Sea, ST/LEG/Ser B/6, (New York: United Nations, 1957), p. 39.

[19] United Nations, Second United Nations Conference on the Law of the Sea, Summary Records of Plenary Meetings and Meetings of the Committee of the Whole. A/Conf. 19/8 (Geneva: United Nations, 1960), p. 52.

Iceland

The Icelandic application of straight baselines is similar to the Norwegian system. It provides for straight baselines to be drawn between designated basepoints. The points enclose the main islands of the Icelandic grouping. The islands of Kolbeinsey, Grimsey, Hvalsbakur and Geirfugladrangur, located at distance greater than four miles from the main island are treated in the traditional manner in that they possess their own territorial sea. The rationale on which the Icelandic system is based is economic related directly to fishing. It is founded on a series of laws, the first of which concerned the scientific conservation of the continental shelf fisheries and was dated April 5, 1948.[20] It concerned the intention of the Icelandic Government to regulate fishery resources and fines which could be levied on violators. The initial base-points were contained in Regulations dated April 22, 1950, which was modified by the Regulations for the Conservation of Fisheries of the Icelandic Coast of 19 March 1952.[21]

Yugoslavia

A straight baseline system has been instituted by Yugoslavia. Baselines were established by an enactment of December (November 28)

[20]Law No. 44, cited in United Nations, Legislative Series (1951) Vol. I (New York: United Nations, 1951), p. 12; and Brunson MacChesney, International Law Situations and Documents, 1956. Vol II. (Washington: Government Printing Office, 1957), p. 466.

[21]cited in MacChesney, op. cit., pp. 471-472.

1948 to establish the reference for measurement of a six mile territorial sea along the outer fringes of the coastal archipelago and the Yugoslav mainland were considered as inland waters.[22]

In an Embassy note of May 5, 1949, the baselines were also described.[23] The rationale for this system was:

> The Federal People's Republic of Yugoslavia shall regulate the cabotage as well as the exploitation of the underground wealth in her coastal sea.

In its comments on the International Law Commission Draft Convention on the Territorial Sea and Contiguous Zone, the Yugoslav Government reiterated its adherence to a straight baseline concept:

> If a group of islands (archipelago) is situated along the coast the method of straight baselines joining appropriate points on the islands facing the high seas shall be applied. The parts of the sea closed in by these lines, islands and coast of the mainland will be considered as internal waters.
>
> 3. If the provisions of paragraph 2 of this article cannot be applied to the group of islands (archipelago) due to a great distance from the mainland, the method of baselines will be applied to appropriate points on the coast towards the high seas. Parts of the sea enclosed by these lines and islands will be considered as internal waters of the archipelago.[24]

[22] A/Conf. 13/37, op. cit., p. 296.

[23] Embassy Note 209, cited in International Court of Justice, Fisheries Case (United Kingdom v. Norway), Pleadings, Oral Aruguments, Vol. III (The Hague: International Court of Justice, 1951), p. 750.

[24] International Law Commission, Yearbook 1956, Vol. II., op. cit., p. 100.

Norway

The Norwegian system was extended southward to cover the remainder of the Norwegian coast, south of 66 28.8' North Latitude, by Royal Decree of June 18, 1952, amended by Royal Decree of October 17, 1952. An additional decree by the Crown Prince Regent on June 30, 1955, further extended the straight baseline system to Jan Mayen Island waters.

Finland

In 1956, Finland enacted a straight baseline system for all of its coastline. By both Presidential Decree and by legislative action on August 18, 1956, the points defining the baselines were promulgated, dividing territorial waters into internal waters and external territorial waters (or territorial sea), employing a four nautical mile breadth for the latter.[25]

Although coastal archipelagos were outlined by straight baselines, connecting the base-points, Finland affirmed that

> A single island, rock or skerry, or composite group thereof situated far out to sea may have independent territorial waters.

The distance between base-points was specified as "twice the breadth of the territorial sea." Provision was made for revision of

[25]Act No. 463 set forth principles "concerning the boundaries of the territorial waters of Finland"; Order No. 464 applied these principles and specified basepoints; both are cited in ST/LEG/ser B/6; op. cit., p. 805ff.

base-points at thirty year intervals.

A curious provision in light of the four mile territorial sea was the specification of a three mile breadthfor territorial waters of islands, rocks or skerries, or composite groups thereof located over 8 nautical miles at sea.

III. THE UNITED STATES POSITION ON STRAIGHT BASELINES - THE CALIFORNIA CASE

The immediate appeal of straight baseline systems growing out of the Anglo-Norwegian Fisheries case was not confined to foreign nation-states. California, with an eye towards enclosing all the oil wells off her shores within territorial or inland waters and claiming for the state resorces of her tidelands, sought to employ a straight baseline system for delineation of waters to include the offshore islands between Point Conception and Point Loma. Further, the state sought to negate the ten mile closing rule for bays and use the "headland rule", as set forth in the Anglo-Norwegian Fisheries case.

The United States, on the other hand, contended that the territorial waters off the coast of California must be delineated by three mile breadth of territorial sea, using the low-water mark as a reference for its measurement. The United States also considered the ten mile closing line for bays as applicable. The basis of the U.S. case pertaining to offshore islands was the Corfu Channel case. The crux of this case was that the Corfu Channel, passing between Corfu Island and the

mainland, was not part of the internal waters of Albania. California contended that had Corfu Island belonged to Albania rather than Greece, the channel could have been declared the internal waters of Albania.

On December 3, 1951, the Supreme Court of the United States ordered the case to be heard by a Special Master. Upon accomplishment of this, the Special Master submitted his report, dated October 14, 1952, and ordered filed on November 10, 1952.

He defined the issues of the case as:

> Question 1. What is the status (inland waters or open sea) of particular channels and other water areas between the mainland and the offshore islands, and, if inland waters, then by what criteria are the inland water limits or other water areas to be determined?
>
> Question 2. Are particular segments in fact bays or harbors constituting inland waters and from what landmarks are the lines marking the seaward limits of bays, harbors, rivers, and other inland waters to be drawn?
>
> Question 3. By what criteria is the ordinary low water mark on the coast of California to be ascertained?[26]

Dealing with the first two questions developed into a determination of the position of the United States with regard to straight baseline systems and closing lines for bays.

Question 1 dealt with the problem of straight baselines directly. In his determination, the Special Master relied on a letter from the Secretary of State on this subject.[27] Mr. Dean Acheson, then Secretary of State, indi-

[26]Special Master's Report of October 14, 1952, p. 1-2, 332 U.S. 19, cited in Aaron L. Shalowitz, Shore and Sea Boundaries, Vol I. (Washington: Government Printing Office, 1962), p. 329.

[27]Letter from Department of State to Department of Justice, November 13, 1951, cited in Shalowitz, op. cit., p. 357.

cated that the Norwegian system of straight baselines was considered not contrary to international law, as set forth in the judgment of the International Court of Justice in the Anglo-Norwegian Fisheries case:

> The decision of the Court, however, does not indicate, nor does it suggest, that other methods of delimitation of territorial water such as that adopted by the United States are not equally valid in international law. The selection of baselines, the Court pointed out, is determined on one hand by the will of the coastal state which is in the best position to appraise the local conditions dictating such selection, and on the other hand by international law which provides certain criteria to be taken into account such as the criteria that the drawing of baselines must not depart to any appreciable extent from the general direction of the coast, that the inclusion within those lines of sea areas surrounded or divided by land formations depends on whether such sea areas are sufficiently closely linked to the land domain to be subject to the regime of internal waters, and that economic interests should not be overlooked the reality and importance of which are clearly evidenced by long usage. . .[28]

Enumerating previous positions taken by the United States, enunciated at the Hague Conference in 1930 and in times previous to that Conference, the Special Master came to the conclusion that:

> The absence from international law of any customary, generally accepted rules fixing the baseline of the marginal belt is, indeed, conspicuous[29]

He recalled the failure of the 1930 Hague Conference to reach agreement on baselines and indicated that though the 1951 Fisheries

[28]Ibid., p. 357.

[29]Special Master's Report, p. 8., cited in Shalowitz, op. cit., p. 333.

judgment represented a step in this direction:

> But for the time being it must be conceded that no such customary or generally recognized rule exists.[30]

It was on this basis that the Special Master decided against the claims of California and against the authenticity of the straight baseline system the state proposed. The ruling on Question 1 pointed this out, saying:

> The channels and other water areas between the mainland and the off-shore islands within the area referred to by California as the "over-all unit area" are not inland waters. They lie seaward of the baseline of the marginal belt of territorial waters, which should be measured in each instance along the shore of the adjoining mainland or island.[31]

A second portion of the report of the Special Master in the California case, of interest to a study of straight baselines, is that regarding the closing lines of bays, or for that matter, the determination of what constitutes a bay, since these issues are usually closely related to straight baselines. Again on this issue, the Special Master leaned to the position of the United States taken in international relations on the subject of bays.[32] Relying on this position and the supporting historical rationale, with particular attention to that related to the 1930 Hague Conference, the report stated:

> The extreme seaward limit of inland waters of a bay is a line ten

[30] Ibid.

[31] Special Master's Report, p. 2-3, ibid, p. 330.

[32] Secretary of State Letter, November 13, 1951, ibid. pp. 354-357.

> nautical miles long. For indentations having pronounced headlands not more than ten nautical miles apart, and having a depth as hereafter defined, a straight line is to be drawn across the entrance. Where the headlands are more than ten nautical miles apart, the straight line is to be drawn at the point nearest the entrance at which the width does not exceed ten nautical miles. In either case the requisite depth is to be determined by the following criterion: The envelope of all the arcs of circles having a radius equal to one fourth the length of the straight line shall be drawn from all points around the shore of the indentation; if the area enclosed by the straight line across the entrance, and the envelope of the arcs of the circles is greater than that of a semi-circle with a diameter equal to one half the length of the line across the entrance, the waters of the indentation shall be regarded as inland waters, if otherwise, the waters of the indentation shall be regarded as open sea.[33]

It is interesting that both these determinations are reiterations reiterate principles set forth by the United States proposal made at the 1930 Hague Conference. In effect, the judgement of the International Court of Justice in the Anglo-Norwegian Fisheries case was discounted in favor of the concepts advanced by the United States at that conference. This is perhaps understandable in view of the newness of the Court decision and particularly when it is realized that in the same year (1951), the geographer of the State Department had written an empassioned plea in favor of the system he had advanced at the 1930 Conference, the arcs of circles method of delimitation quoted above.[34]

[33] Special Master's Report, p. 3-4, ibid., p. 330.

[34] S.W. Boggs, "Delimitation of Seaward Areas under National Jurisdiction", American Journal of International Law, Vol. 45 (1951), pp. 210-266.

In view of the determination of the validity of the straight baseline system and its acceptance at the 1958 Geneva Conference, and the rejection of the 10 mile closing rule in favor of the 24 mile closing rule, perhaps the United States versus California case should be re-examined.

It is unlikely that the coast of California near Point Conception and the offshore islands to the southwest of it could be considered as "deeply indented" and "cut into" or to have a "fringe of islands along the coast in its immediate vicinity". Thus the straight baseline system would scarcely apply. With regard to bays, however, it is possible that San Pedro Bay could be delimitated at least to Huntington Beach without resort to the historic bay principle which, in effect, produced a stalemate in the California case.[35]

The United States has shown no tendency, officially, to move either to a straight baseline system or to any relaxation of the traditional arcs of circles method (Bouge method) or the ten mile rule for bays. The United States has,however, signed the 1958 Conventions.

Only this year, the present geographer of the State Department, G. Ethel Pearcy has said with regard to baselines:

> Regardless of international politics, the geographer must step in and provide a means of measuring territorial waters irrespective of their breadth. A baseline must be established from which measurements can be accurately and fairly projected. Such a baseline, seemingly simple in that it merely needs to follow the shore, actu-

[35]Shalowitz, op. cit., pp. 51-60.

ally requires sufficient flexibility to allow for such features as the mouths of rivers, bays, and other indentations of coast, islands including archipelagos, and tides which alternately cover and uncover coastal features.[36]

With this in mind, it is relevant to look at the implications of straight baseline systems.

[36]G. Etzel Pearcy,"Geography and World Affairs", Department of State Bulletin, Vol. III, No. 1357, June 28, 1965, p. 1037.

CHAPTER VII

IMPLICATIONS OF THE APPLICATION OF STRAIGHT BASELINE SYSTEMS

I. EFFECT ON FREEDOM OF THE SEAS

In the rigorous interpretation, any extension of either territorial or internal waters into the area of what has been known as the high seas will impinge on the freedom of the seas. Much has been written about the effects of extension of the territorial sea into the high seas. It is obvious that claims of a 200 mile territorial sea much as that of Peru will have a tremendous effect on other than fishing rights. There is the aspect of this, too, as pointed out by the Greek delegate to the 1958 Geneva Conference on the Law of the Sea when he indicated that although Greece preferred a three mile breadth of territorial sea, actions by neighbors forced legislation by Greece of a six mile breadth for the territorial sea.[1]

There is an analogous relationship to the Greek situation involved in application of straight baselines. Where use of baselines on a coastal archipelago such as Norway will have considerable effect on the international fishing community, application of a straight baseline system to an ocean archipelago such as Indonesia or the Philippines will effect all modes of

[1]United Nations, United Nations Conference on the Law of the Sea, Vol. III, First Committee (Territorial Sea and Contiguous Zone, A/Conf. 13/39(New York: United Nations, 1958), pp. 21-22.

[illegible] vicinity of territorial waters of, or international waters used by, a neighboring state, problems increase considerably in complexity. Such is the case with regard to the Yugoslav, Finnish and Swedish archipelagos (or island groupings) and will inevitably occur should a straight baseline system be applied to such areas as the Japanese islands, or the Alaskan or Siberian coastlines.

[illegible] revert to the principle of mare clausum?

There is a requirement in the operational order of things that any restrictive practice have substance to it. To formulate rules and regulations which have no relation to reality is not only a form of self-delusion, but degrades the validity of existing and pertinent rules, regulations or laws. Charles de Visscher has indicated that one of the factors which weakens the effectiveness of the International Court of Justice is the reluctance of states to bring their disputes before that tribunal and to submit to its jurisdiction.[2] How much more will this be true if a myriad of rules and regulations are formulated by individual nations without regard to international consensus, but as a form of self-adulation.

[2]Charles de Visscher, Theory and Reality in Public International Law, (Princeton: Princeton University, 1957), p. 341.

Certainly the concept of regulation of all the subsurface of the seas is an [illegible] and unrealistic one. For nations to extend their sovereignty over large areas of the seas still now known as high seas without hope of enforcing their claims by either power possessed by their own state or by international organs (of which there are none effective in this regard today) can do little more than generate international friction or at best endue the nation prosecuting the claim with a false sense of security.

Wide claims is neither a realizable nor a desirable goal in this world of faster and faster vessels, in an age of intercontinental ballistic missiles. The great naval powers are not so deluded as to advocate such a measure. Smaller and developing nations have no hope to enforce their claims of sovereignty on their own, contrary to the will of the major powers. In reality, it is on the smaller scale that extensions of sovereignty are sought. It is a regression to the issues which were thrashed out and solved by the maritime powers more than a century ago. Fishing rights, where disputed, must be a subject of negotiation, not a case of unilateral determination. Unilateral determination of even so simple an issue as fishing, where the issue is international in nature, can do little but generate squabbles among neighboring nations. If the world has learned any one thing in the course of the existence of the international system, it should have learned the value of the conference table for equals or near equals. Major powers will be unimpressed with claims of small powers for control of subjacent waters over that accepted by the majority of nations as free seas. Smaller powers should conduct their business, that is, matters

local in nature, on a bilateral or multilateral basis, using good offices where necessary, but realistically approaching their problems with an aim at solution rather than as the "mouse that roared".

Proliferation of straight baseline systems extending beyond the systems clearly justified by the Convention on the Territorial Sea and Contiguous Zone will result in erosion to a great magnitude of those areas now known as the high seas. The areas of internal waters resulting from drawing of straight baselines would, for enforcement of control, require that the claimant nation possess significant naval or coastal patrol forces.

In the case of ocean archipelagos, the most significant candidates for straight baseline systems not authorized by the Convention, large fishing grounds now open to all nations will become the private fishing grounds of a single nation. One can not avoid the speculation that the result of this restriction of fishing grounds might be, in the broad overview, more deleterious to the economic life of many nations than the cost of sharing those grounds would be to the nation unilaterally claiming them.

Straight baseline systems affect the Convention on the Continental Shelf in that the widening of the territorial seas or the increase of the area of internal waters will restrict that portion of the continental shelf treated by the convention.

In addition to the claims to vast areas of the high seas as internal waters, as in the case of Indonesia, there is a tendency to

restrict passage through these waters. Secretary of the Navy, Paul H. Nitze, has said in this regard:

> Some of the newly emerging nations are disposed also to deny the validity of the right of transit through international straits -- a right which the United States is clearly constrained to assert and uphold. Obviously, the maritime nations of the world must insist that there be free right of transit through such straits for their vessels of commerce and for their security forces as well.[3]

II. INNOCENT PASSAGE

Closely interwined in the concept of freedom of the seas is that of "innocent passage". Where territorial waters must be traversed, the right of innocent passage is the principle normally invoked for such passage. By Article 14, paragraph 4, of the Convention of the Territorial Sea and Contiguous Zone:

> 4. Passage is innocent so long as it is not prejudicial to the peace, good order, and security of the coastal State. Such passage shall take place in conformity with these articles and with the rules of international law.[4]

This is a rather general article and [illegible] which indicates that it was the product of examination of the rather broad area which falls within the concept of innocent passage and setting forth in the convention the area upon which agreement could be reached. This is borne out by the

[3]Paul H. Nitze, "Trends in the use of the Sea and their Implications on Foreign Policy," Marine Corps Gazette (March, 1965)

[4]Aaron L. Shalowitz, Shore and Sea Boundaries, Vol. 1, (Washington: Government Printing Office, 1962), p. 373.

official records of the 1958 Geneva Conference.[5]

It is generally recognized that a warship is afforded the right of innocent passage as is any other type ship. The Soviet Union has entered a reservation to Article 23 of the Convention dealing with passage of warships through territorial waters. It reads:

> The Government of the Union of Soviet Socialistic Republics considers that a coastal state has a right to establish procedures for the authorization of passage of foreign warships through its territorial waters.[6]

The fact that this reservation was made indicates that the U.S.S.R. did derive that the right of innocent passage was granted for warships by the Convention.[7]

The right of innocent passage for submarines was restricted in that "submarines are required to navigate on the surface and show their flag."[8]

The only guarantee of innocent passage in internal waters contained in the Convention on the Territorial Sea and Contiguous Zone is paragraph 2 of Article 5 which states:

Where the establishment of a straight baseline system in accord-

[5]United Nations, United Nations Conference on the Law of the Sea, Vol. III, First Committee (Territorial Sea and Contiguous Zone), A/Conf. 13/39 (Geneva: United Nations, 1958), p. 127ff.

[6]Shalowitz, op. cit., p. 375; U.S. Congress, Senate, Four Conventions and an Optional Protocol Formulated at the United Nations Conference on the Law of the Sea, Executives J to N, 86th Cong, 1st Sess. (Washington: Government Printing Office, 1959), p. 26.

[8]Shalowitz, op. cit., p. 373.

[7]An excellent discussion of this, Carl M. Franklin, International Law Studies 1959-1960, Vol III, (Washington: Government Printing Office, 1961) pp. 133-135.

> ance with article 4 has the effect of enclosing as internal waters areas which previously had been considered as part of the territorial sea or of the high seas, a right of innocent passage shall exist in those waters.[9]

There is no mention of how long such a right continues to exist or of the problems which arise where a nation unilaterally establishes its straight baseline system and documents as deriving from antiquity.

Another interesting facet of innocent passage relates to nuclear weapons. A motion made by the Yugoslav delegation to the 1958 Conference would have proposed:

> The coastal State may deny the exercise of the right of innocent passage to any ship carrying an kind of nuclear weapons.[10]

Although "ship" was changed to "warship", the proposal was defeated. Franklin interprets this:

> By refusing to accept this proposal, the First Committee clearly indicated that the mere carrying of any kind nuclear weapons on board a warship within the territorial sea of another state could not be prohibited.[11]

Note that there is again the opportunity for a state to prohibit passage of warships carrying nuclear weapons in internal waters. Franklin has posed some cogent questions which deal with the nuclear weapons question in relation to innocent passage.[12] Latitude is granted in the Convention for the coastal State to determine what is prejudicial to its "peace, good order and security".

[9] Shalowitz, op. cit., p. 371.

[10] A/Conf. 13/39, p. 214.

[11] Franklin, op. cit., p. 140.

[12] Ibid., pp. 140-144.

The judgement of the Corfu Channel case[13] had indicated that the manner in which passage is carried out is the determinant of whether that passage is innocent and not the character of the ships effecting passage. Again, the interpretation of such innocent passage rests with the coastal State unless contested after the fact as was Albania's actions in the Corfu Channel.

The Convention grants a further latitude to the coastal State that:

> . . . to suspend temporarily in specified areas of its territorial sea the innocent passage of foreign ships if such suspension is essential for the protection of its security.[14]

Logically, it follows that this would also be true of internal waters covered by Article 5(2).

In summary, the, innocent passage is guaranteed in the territorial sea and in certain parts of internal waters (those covered by Article 5(2)) by the Convention. This guarantee is, however, based on the judgement of the coastal state in determining what constitutes innocent passage and the requisites for its "peace, good order and security". Further suspension of the right of innocent passage is permitted under Article 16(3).

Straight baseline systems, with their inherent extension of territorial waters substitute reliance on the right of innocent passage for free navigation on the high seas, in sometimes vast waters converted to internal waters or territorial sea. Presumably,

[13]Herbert W. Briggs, The Law of Nations, (wd. Ed.) (New York, Appleton-Century-Crofts, 1952), p. 294.

[14]Shalowitz, op. cit., p. 374.

the security of the coastal state is thus enhanced. In the next section, this purported enhancement will be scrutinized.

III. SECURITY IMPLICATIONS

In a world which is held in the balance by the existence of mutual deterrence between the United States and the Soviet Union, freedom of the seas can have wider implications than are derived from past maritime ventures. The use of the POLARIS system as a major factor in the United State's deterrent and retaliatory force has highlighted the anonymity with which a submarine, nuclear-powered and virtually silent, can manoeuver beneath the seas.

Innocent passage does not, in the view of the majority of the attendees of the 1958 Geneva Conference, extend to submerged submarines. The difficulty of a state claiming vast areas of sea as internal waters in detecting a submarine travelling submerged is relevant to its realistic determination of these waters.

As was cogently described by Mr. Arthur Dean, the U.S. delegate to the 1958 Geneva Conference:

> On 31 March of this year (1960), the TRITON passed submerged through the Surigao Strait, south of Luzon in the Philippines, across the Mindinao Sea, then through the Macassar Strait and south of Java into the Indian Ocean. Thus, the TRITON passed submerged through the waters within the Indonesian and Philippine archipelagos, which are claimed unilaterally by each of these nations as "internal waters", although they include vast high seas areas. Under international law, foreign vessels may not pass through internal waters as of right even if their passage is innocent. It is for this reason that we do not recognize the validity of this extensive and unilateral archipelago theory.[15]

[15]Arthur H. Dean, "The Second Geneva Conference on the Law of the Sea", American Journal of International Law, Vol 52, (1960), p. 753.

Clearly, the right of innocent passage cannot be extended to a fleet of fleet ballistic missile submarines on patrol. But, it is obvious that should extensive use of these submarines as a deterent against Communist China or other hostile emerging nuclear powers be unaugurated, it could involve stationing of submarines in waters claimed as internal by Indonesia or the Philippines. From the standpoint of both security of the Western powers, and indeed, for the protection of the future of the entire world, one can hardly expect the United States to accept straight baseline systems which involve inhibition of deterent operations by the absorption of a huge expanses of the oceans.

A similar problem exists with regard to some other countries adopting straight baseline systems. Should Canada, for one adopt such a system, it could cut off primary routes for submerged polar ice-cap navigation.

The foregoing discussion has related to security in the broad sense, that of the world accruing from a balance of deterence between the U.S. and the U.S.S.R. and implications of straight baseline systems which might pertain to that deterence. To the individual state, implementation of a straight baseline system can stem from a desire for "maintenance of order and security" in addition to any economic considerations. Indonesia has indicated that this is one of the foremost considerations and aims in establishing its system for delimitation of the Indonesian archipelago by straight baselines.

In viewing delimitations by straight baseline systems, one must realize that unless a system is clearly justifiable under the Convention

for the Territorial Sea and Contiguous Zone, and accepted by the nations most affected, a unilateral determination is virtually useless.

> Unilateral declarations of sovereignty . . . are legally unsound since they involve the assertion of rights which a state does not clearly have. This type of action also contains several elements of risk with possibly grave consequences. A state making a unilateral declaration must make some efforts to assert its rights, perhaps even with varying degrees of force.[16]

The ability of a nation to assert its rights to unilaterally declared internal waters may be great when dealing with a neighbor of equal power, but inconsequential against a major power, particularly one of the Big Two.

The fishermen rendered free attempts at asserting sovereignty when pitted against the wandering trawlers of the Soviet Union, backed by the power of the Soviets, or against patrolling or transitting naval ships of the United States, may best be avoided. It is true that in this nuclear world the smaller nations have, by virtue of the muscle-bound posture of the U.S. and the U.S.S.R., been able to claim a voice in international affairs far outstripping their potential power. It is also true, however, that when the national interest of these great nations is involved, the smaller nation treads on thin ice indeed.

[16]LCDR L.A. White, USCG, "A Code of Conduct for Fishing Grounds", U.S. Naval Institute Proceedings, Vol. 91, No. 3, Whole Number 745 (March) 1965), p. 79.

CHAPTER VIII

PROSPECTS

2. FURTHER APPLICATIONS OF STRAIGHT BASELINES

As one can see from the foregoing chapters, the move towards straight baseline systems as a method of delimiting internal waters has been rather dynamic since the Anglo-Norwegian Fisheries judgement. The question of recognition of these systems constitutes the essential international legal aspect of such a system against which the relevance of systems unilaterally promulgated must be viewed. A further point of speculation is what further applications of such systems may arise in the future.

In the Western Hemisphere, perhaps the most extensive application of the straight baseline system could be made in the case of Canada and Alaska, the latter being a state of the United States. The Canadian application could have far-reaching implications in that passages in the vicinity of the Davis Strait, used by United States submarines on their voyages to the North Pole would become internal waters of Canada. Additionally, the Hudson Bay, a tremendous expanse of water could become, likewise, an internal bay. A claim such as that to Hudson Bay as internal waters would, however, necessitate invocation of the doctrine of "historic waters". In the case of Alaska, it would follow from the general application of the straight baseline concept by the United States. On May 12, 1965,

a bill was introduced in the United States Senate by Senator E.L. Bartlett of Alaska which would advocate application of straight baselines to the United States. The bill, S.1934, states as its purpose:

> To protect coastal fishery and other resources by implementing the Convention on the Territorial Sea and Contiguous Zone.

The bill, if enacted, would express as the sense of Congress the implementation of the Convention on the Territorial Sea and Contiguous Zone, and provides that:

> . . . in localities where the coastline is deeply indented and cut into, or if there is a fringe of islands along the coast in its immediate vicinity, the method of straight baselines joining appropriate points be employed in drawing the baseline pursuant to Article 4 of the Convention.

The impact of this bill could be telling. Although the Florida Keys qualify readily under the traditional concept of delimitation of the territorial sea, the distance between the islands being sufficiently close to render the waters adjacent a continuous strip of internal waters, the Alaskan coast presents a different picture. The Alaskan coast, and the Aleutian Islands, being somewhat similar to the Norwegian coast, come immediately to mind as candidates for straight baseline systems. The mere delimitation of waters among these islands as internal would, per se, have significant impact on navigation and fishing, particularly in the Bering Strait area. Far overreaching such impact, however, would be the effect of application of straight baselines by the United States. In the delimitation of the territorial sea, the United States has repeatedly disavowed any practice other than the measurement directly from the

[illegible] seek on the seaward. The United States proposal at the 1930 Hague Conference recognized the use of straight baselines.[1] This method was again advanced by the official United States position during the United States vs. California proceedings. At the 1958 Geneva Conference on the Law of the Sea, the use of circular method was again advanced by the United States, and the concept of straight baselines considered as an infringement on freedom of the sea by the United States. Mr. Arthur Dean, the United States delegate to the United Nations Conference, stated in this regard at the beginning of the 1958 Conference:

> The Committee should bear in mind that whatever was added to an individual State's territorial waters must inevitably be subtracted from the high seas, the common property of all nations. For example, if Iceland were treated as an archipelago and a twelve mile belt was drawn around the entire archipelago, according to the straight baseline system, then areas of the high seas would unilaterally be claimed as territorial waters or possibly even internal waters. It would be a misnomer to describe such a restriction on the use of the high seas as "progressive" measures.[2]

As described in Chapter IV, the straight baseline system was set forth in the convention as being applicable "in localities where the coastline is deeply indented and cut into, or if there is a fringe of islands along the coast in its immediate vicinity."

Although S. 1934 merely adopts the agreed procedure, its enactment would have significant effect on the credibility of the position taken by the United States towards the application of straight baseline

[1] p. 142.

[2] United Nations, United Nations Conference on the Law of the Sea, Vol. III, First Committee (Territorial Sea and Contiguous Zone), A/Conf. 13/39 (Geneva: United Nations, 1958), p. 25.

[illegible] the international area of [illegible] system, because restricted to application, would undermine the ability of the United States to object to similar systems by those nations or to the consequent curtailment of the high seas.

III. POLITICAL EFFECTS

As the number of nations has multiplied at a rapid rate since the end of the second World War, these nations have become preoccupied with the exercise of their newfound sovereignty. They seek a voice in the world and pressure from interference in their domestic affairs while simultaneously heralding the "have" nations for the differing material and [illegible] aid. It is this [illegible] that these emerging nations become [illegible] while at the same time [illegible] to accept "no strings attached" aid either through bilateral arrangements or through the United Nations.

Indeed, the factors have contributed to the ability of these nations to command a far greater voice in the international system than could be justified on basis of traditional criteria such as military or economic power, industrial potential or productivity. The first of these factors is the Cold War. Its contribution has been manifest in the form of the nuclear stalemate between East and West, producing a bipolar world in the immediate post-war period. Since that time, the mutual recognition of the ability of the United States and the Soviet Union to annihilate

which alone can reduce much of the world to a radioactive wasteland in the process has led to this stalemate among the nuclear giants. A corresponding inability to use this vast nuclear strength in dealing with the smaller, developing nations, has resulted in a situation where the major power appears somewhat baffled by the self-assertiveness of the upstart nations. This circumstance has generated or enhanced an ability on the part of these developing nations to exert influence on the international system totally unrelated to their strength, measured in the traditional sense.

A second factor contributing to the influence of emergent nations is the competition for their allegiance, or acquiescence, whichever might be applicable. This results from the efforts of the United States, the Soviet Union, and, more recently, the Communist Chinese, to proselyte the "fellows on fence" through financial and technical aid, both unilateral and multilateral. As the "partner desired" in such a venture, the recipient nation gains stature as a result of this desirability. Internationally, it becomes a factor in the disproportionate voice the "have not" nations have gained in world affairs.

As a spin-off effect, change has become, to the majority of the new nations synonymous with progress. The iconoclastic approach to traditional international legal precepts has led to a questioning of all facets of traditional international law which can be modified to enhance the sovereignty of nations, or to enhance their economic stability. Not

unrelated to this phenomenon or the lack of harmony of many of these nations with the Judeo-Christian heritage on which traditional international law is based. Growing out of all this is opposition to traditional concepts such as the three mile limit for the breadth of the territorial sea. It is likewise in this vein that the move to increase internal waters by application of straight baselines has evolved.

The Secretary of the Navy, Paul H. Nitze, recently pointed out that:

> The Soviet Union, and then a score of other nations have claimed, on their own and outside the limits of international law, wider limits for their territorial waters than permitted by the traditional three mile limit. The effort has been spurred by desires to achieve political aims at the expense of other nations, and to gain expansive and exclusive control of fisheries. In other instances, governments have been attempting unilaterally to put aside the traditional law related to baselines for measuring the territorial sea. The intention is to pre-empt as internal waters vast areas hitherto established and used as high seas.[3]

The desire to gain the sanction of international law, per se, vested in the United Nations or some other forum based on equality of states in influence rather than on their potential power of the ability of states to pursue their aims through strength, is bound to increase friction among nations. The fabrication of claims to greater areas of the high seas than can be controlled and in a manner adverse to the interests of more powerful nations by a small nations is either an invitation to conflict or constitutes an empty boast.

[3]Paul H. Nitze, "Trends in the use of the Sea and Their Implications on Foreign Policy", Marine Corps Gazette, March, 1965.

[illegible]

The [illegible] effects of straight baseline systems are most felt by small nations who derive a large percentage of their food from the sea, and in the case of nations such as the Philippines and Indonesia, depend on the fruitfulness of the sea for a large proportion of the protein consumed by their populations. Any nation which has a large fishing industry is, however, affected by such systems. If fishing fleets are migratory in nature, as in many cases, the straight baseline system is going to have a restrictive effect on these fleets, perhaps severely hampering their operation. Where large supplies of fish life are present in waters adjacent to the coastal state, a possible detailed system is protective in nature, since it is the practice of states to restrict their territorial waters to fishermen of their own nations.

The very existence of many fishing men, particularly those who have plied the seas in search of a catch in order to derive their livelihood makes restriction repugnant to them. Friction will follow such restriction. There is ample evidence of this in the annals of international law and of the sea. The North Atlantic Fisheries case, the Anglo-Norwegian Fisheries case, the many litigations between the United States and Peru occasioned by fines levied against those American fishermen who violate the 200 mile territorial sea claimed by Peru, the virtual wars between Honduran and U.S. shrimpmen in search of wandering shrimp. Even on the domestic scene, there have been major disputes between Mary

[illegible]

In further evidence of the seriousness of fishermen, what sailor has not crawled upon deck to find fish traps and lobster pots strewn in the passage he thought of relief by navigation. On the coasts of North Africa, fishermen have staked nets far out into the Straits of Gibraltar.

All of this indicates that fishermen will be curtailed by straight baseline systems unless they are indigenous to the nation which promulgates them. Where fish are scarce or where many nations are accustomed to fishing, friction will be the outgrowth of straight baseline systems. Where nations are in close proximity one to the other and the fishermen of one are denied their traditional fishing grounds by implementation of a straight baseline system by the other, severe economic hardship can result.

In the wider sense, the use of straight baseline systems which cut across traditional international routes will work hardships against many nations. The rerouting of ocean traffic to avoid regulation by a coastal or archipelagic state can increase the expense of sea transportation and result in the use of hazardous routes. Innocent passage, it was pointed out earlier,[4] is guaranteed only in the territorial sea and where internal waters were once international routes. Franklin has pointed out:

> These increased costs would represent an unnecessary economic waste and result in a further shackling of world trade at a time when one of the great needs of the world is to facilitate the free flow of goods and people. It is seldom realized that the world's ocean commerce accounts for more than three quarters of the total tonnage of goods exchanged among states.[5]

[4] p. 104ff.

[5] Carl M. Franklin, International Law Studies 1959-1960, Vol. LIII, (Washington: Government Printing Office, 1961), p. 125.

[illegible] economic implications of straight baseline system use. Will the extension of internal waters or such system accomplish the economic benefits sought in the following account. Is this the sensible approach to the problem?

Where a well-known coastal such as the establishment of straight baseline systems is taken as a world as whole interdependencies is clearly the cause of controversy, not only in its negative. It is in this real will the most unfortunate effect of straight baseline system lies. They overlook an appreciation of the economic interdependence of the peoples of the world. For the most part, the major powers recognize this interdependence. It behooves all nations to do so. Moves should be undertaken to share fishing grounds and to encourage ocean transport to remain in step with the needs of the world today.

Whether they are accepted or not, straight baseline systems implemented for economic reasons represent a regressive tendency. The world may not tomorrow gain harmony, but the obvious missteps productive of discord should be resisted. A recent article approached the problem of fishing grounds from the standpoint of a multinational "Code of Conduct for Fishing Grounds."[6] If one is to accept the presence of an exploding population in the world, an approach must be made to share the nutritive wealth of the seas and to embark on conservation programs to ensure the efficient use of that wealth.

[6] Lord D.C. Walker, 1962, "A Code of Conduct for the Fishing Grounds", U.S. Naval Institute Proceedings, Vol. 95, Number 3, Whole Number 745, pp 76-82. (March 1969)

of the sea which stated in its preamble:

> [illegible] considering also that the nature of the problems involved in the conservation of the living resources of the high seas is such that there is a clear necessity that they be solved on the basis of international cooperation through competent groups of all states concerned. . .

IV. MILITARY ASPECTS

The military aspects of straight baseline systems are both obvious and subtle. The various effects are usually measurable and in the physical realm. The overall effects are more subtle, being felt in the political realm. The mere existence of straight baseline systems would probably [illegible] for any wholesale application of such systems.

Where the straight baseline military effect stems from the increased expanse of internal waters claimed by a coastal and archipelagic state in a straight baseline system. There occurs immediately a requirement for the coastal state to secure its claim. This requires a force by which to enforce control -- a naval force or a coastal force.

On the part of a state which might have previously used the waters which have now become internal waters as an anchorage, training ground, or for patrols to protect their national interest, the necessity arises for either a shift in location of these activities or violation of what is claimed as internal waters by another state.

The doctrine of hot pursuit will be altered in that craft being pursued may seek refuge nearer than previously and as a result of extended

internal waters resulting from the implementation of straight baseline systems, where this occurs.

Less obvious are the military effects which are not immediately discernable. These include:

a. A false sense of security on the part of the coastal or archipelagic state which considers that delineation of territorial waters unilaterally gives any assurance that the boundaries so laid out will be accepted by other nations.

b. Increased friction between an implementing state and neighboring maritime or fishing fleets, which could lead to local or general hostilities.

c. Potential source of conflict arising from varying opinions on "innocent passage".

d. Contribution to the increased complexity of an already labyrinthine situation of military restrictions, rules of engagements, acceptable routes, etc.

In addition to these less obvious effects of the applications of straight baselines systems is one which is of interest to the United States, the inhibition caused by curtailment of areas of the high seas and re-designating them as internal waters on the operations of naval forces of major powers, particularly strategic deterrent, damage limiting, or retaliatory forces. It is obvious that neither the United States, nor for that matter, the Soviet Union, will accept inhibitions or restrictions which curb their ability to disperse deterrent, damage limiting, or retaliatory forces. A similar repugnance to restriction would exist where important intelligence gathering forces were involved.

From the above discussion, it would appear that appraisal of the military effects of a straight baseline system where it would envelope large expanses of high seas and many international maritime routes as internal waters, would deter the implementing nation in its course of asserting sovereignty over those areas at the expense of the freedom of the seas.

CONCLUSIONS

Straight baseline systems appear to be rather firmly established as a principle of the law of the sea and of international law. Where they are clearly applicable, these systems can be justified in accordance with Article 4 of the Convention on the Territorial Sea and Contiguous Zone, and it seems likely that they will become incorporated into international law and legal practices. This is true, certainly, of the Norwegian case and would seem valid in the case of other coastal archipelagos: Yugoslavia, Denmark, Sweden, Finland, to name but a few. There will, however, be a reluctance on the part of some states to depart from traditional practices in delimiting the territorial sea even though they may possess coastlines which could well be considered as qualified for straight baseline systems. Such reluctance can stem from political, military, or economic reasons. Certainly the United States can be cited here, where the coast of Alaska could easily be considered as fitting within the description of Article 4 of the Convention.

In cases not clearly falling within the provisions of Article 4, most markedly, those involving ocean archipelagos such as the Philippines or Indonesia, it seems unlikely that sufficient support can be rallied, particularly among the major maritime powers, to secure international acceptance of such a system. Both at the 1930 Hague Conference for the

Codification of International Law and at the Geneva Conferences on the Law of the Sea of 1958 and 1960, little support could be rallied for treatment of ocean archipelagos as individual units, enveloping the many islands, islets, and waters surrounding them.

From the standpoint of freedom of the seas, the wholesale use of straight baseline systems is particularly objectionable. In the United States, both the Chief of Naval Operations, who is the principal advisor to the President on matters dealing with the sea, and the Secretary of the Navy have, within the past year, indicated concern with such a practice.

Admiral McDonald stated the United States position on this practice:

> Some nations have unilaterally claimed sovereignty over extended areas of water off their coasts. This claim is without foundation in law; has never been accepted in the past and should not be accepted today.[1]

Mr. Nitze was more pointed in his reference to straight baseline systems:

> . . . governments have been attempting unilaterally to put aside traditional law related to a baseline for measuring the territorial sea. The intention is to pre-empt as internal waters vast areas hitherto established and used as high seas.[2]

There are cogent political, economic, and military reasons for opposing the curtailment of the seas by straight baseline systems. A summary of the more important of these would include among adverse effects accruing from such systems:

[1]United States Senate, Committee on Armed Services, Military Procurment Authorizations, Fiscal Year 1966, Hearings before the Committee and the Subcommittee on Department of Defense of the Committee on Appropriations, 89th Cong, 1st Sess, on S. 800, February 24-March 15, 1965 (Washington: Government Printing Office, 1965), p. 753.

[2]Paul H. Nitze, "Trends in the Use of the Sea and Their Implications on Foreign Policy", Marine Corps Gazette, March, 1965.

a. Undermining of the international legal system by proposal of incorporation of domestic legislation into that system which would not be accepted by the maritime powers. This effect would be particularly evident should the application of straight baseline systems extend beyond cases which can be justified under the existing Convention.

b. Provision of a source of friction between smaller nations, particularly where contests develop over the extent of fishing rights. The passions stirred would be of a magnitude proportional to the need of the waters in question. Local wars can result from this.

c. False sense of security derived from bombastic claims which can neither be justified nor enforced. Friction with major maritime powers can thus result.

d. Frictions caused by violations of fishing customs, customs regulations, security regulations founded on straight baseline systems. Many of these violations occur as a result of faulty navigation where baselines are long and landmarks sparse.

e. Economic hardships resulting from curtailment of navigation which will have a generally adverse effect on free ocean trade so necessary for continued development of all nations and for healthy intercourse resulting from economical and rapid distribution of raw materials, products and services to world markets.

f. Build-up of coastal and naval forces by states implementing straight baseline systems in order to assert control over their newly claimed waters.

The ramifications of adoption of straight baseline systems by the United States or Canada cannot be overlooked. The immediate result of such adoption would be an undermining of the United States position with relation to other unacceptable applications of straight baseline systems. True, a U.S. system clearly analogous to the provisions of Article 4 of the Convention can be justified under that Convention while ocean archipelagic systems cannot but this major shift in United States policy towards all straight baseline system is bound to weaken U.S. clout in opposition to, say, the Indonesian system.

The principle of freedom of the sea is one which contributes to free trade and to lasting universal affairs. Curtailment of this freedom is bound to adversely affect the already strained U.S. position towards industrialization and economic development. Additionally, peace in the world will be eroded by many so-called violations of sovereignty growing out of extensive claims to sea areas.

The world federalists may be premature in advocating world government <u>now</u>, but there is no reason to swing the other way to a pitting of sovereign states against one another in an effort by each to assert its autonomy. Straight baseline systems are a step in that direction. This is perhaps the strongest indictment of their application. The potential strife which can be caused by numerous states using the concept of straight baselines, liberally applied, can ill be afforded by the nations of the world.

Straight baselines systems must be confined to those which clearly fall within the description set forth in Article 4 of the

Convention on the Territorial Sea and Contiguous Zone. In this context, they represent an innovation which can be fulfilled in the international system of today. An attempt to enlarge the application of these systems, to include ocean archipelagos constitutes regression to an earlier era, long proved to be in conflict with, rather than an example of progress. In giving up their rather futile quest for sovereignty over areas of the high seas, emerging nations will be showing their perception of the lesson that other nations have learned through painful and destructive experience; that it is not by building walls that men and nations learn to live together, but by learning to meet and settle their differences, thereby each contributing to the promise of tomorrow.

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